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Nellie B Chapman

Sheriffs.

Of the nature of a Sheriffs office & the mode of appointing him.

The Sheriff is an officer of very great antiquity his
1 Bl 339. name being derived from two Saxon words, Shire & Reeve
343. the Reeve, Bailiff, or officer of the Shire. He is called in Latin the vice-comes - as being the deputy of the earl or comes. - to whom the custody of the Shire is said to have been committed at the first division of the kingdom into Counties. -

In England Sheriffs are appointed by the King from a nomination of three persons from each county, selected by the 12 Judges & other high of-
1 Bl 340, 1. fiers of State - Formerly they were chosen by the inhabitants of the several Counties. -

By virtue of several old statutes the Sheriffs are to continue in their offices no longer than one year; this rule
1 Bl. 342. however is frequently dispensed with & Sheriffs are appoint-
4 Co 32. ed "durante bene plaito" & so is the form of the royal writ. - It is now very Common for the King to appoint what are called Pocket Sheriffs, durante bene plaito.

In Connecticut Sheriffs are appointed by the Governor & Council, one for each County, & holds his office during the
Ha. St. 383. pleasure of his creators. - So that the office can determine here only by death, resignation or removal. -

Sheriffs.

At Com. Law the Sheriff must reside in the County for
4 Bl. 235. which he is appointed, & if he removed out of it, he forfeited his office. Mr G. thinks this rule would be adopted in Connecticut.

A Sheriff has regularly no jurisdiction out of his own County; yet if it is necessary for the purpose of com-
4 Bl. 448 pleting an official act that he should go out, & he has authority so to do for that particular purpose. — Ex-gr. as if it should become necessary that a person be removed from Litchfield County Goal to the Superior Court now setting in Hartford County, & the Court should issue a writ of habeas Corpus for that purpose; here as no officer could take him from the Goal but the Sheriff of Litchfield County, he has authority
4 Bac. 443. to complete the act by carrying him through Hartford County to the place of the Courts siting. —

So also if the Sheriff of Litchfield County should be required to attach goods in this County belonging to a Deft living in New Haven County, he may & he has full authority to go into the latter County, & there complete the service of the writ by leaving a copy at the Defts abode. —

So also if a prisoner in the sheriffs custody
Hawk. 37. should escape & flee into another County, the sheriff or his of-
4 Bac. 435. fiers on fresh suit may retake him in another County. —

The Sheriff may at common Law appoint deputies
Hob. 13. or under sheriffs, who become his servants, & therefore may execute
4 Bac. 437. all the ordinary ministerial offices of the Sheriff, the maxim here being "qui facit per alium, facit per se".

Sheriffs.

By a recent act of the Legislature of Connecticut, a sheriff cannot appoint a general deputy without the approbation of the Court of Common Pleas for the County for which he is appointed. But he may without such approbation appoint a special deputy. A special deputy is one appointed to do some particular act. He has no authority to execute any writ but such as have a deputation endorsed on the back thereof by the sheriff.—

Stat. 386. It also the sheriff of one County may appoint the sheriff of another County his deputy without the Courts approbation. The deputy is removeable by the sheriff at pleasure. But this Deputy cannot act out of his creators County. Whether any other person than a sheriff can be appointed out of the County is uncertain.— The rule is founded on usage & is sanctioned by the Statute.—

The Deputy is removable by the Sheriff at pleasure, for he is merely the agent servant or attorney of the sheriff: but while

Salk 95. he continues in office the sheriff cannot abridge his power, or take

2 Brownl. 281. away any of the incidents belonging to the office. thus if one is ap-

Hob. 13. pointed Deputy for the County of L. the sheriff cannot limit his authority to any one town nor to any particular process.—

In certain cases under our new Statute the County Ct.

Stat. 501. may on an complaint being made to them, fine a Deputy, suspend the exercise of the office for a time, or disqualify him for ever after holding the office.—

In Eng. the Deputy or under-

Salk. 96. sheriff acts officially in the name of the deputy. when he executes a process therefore, he does it not in his own name, but

in that of the sheriff. Indeed writs in Eng. are never directed to a deputy sheriff but to the sheriff himself, & the Deputy is authorised by a general or special warrant from the latter. –

In Connecticut writs may be & generally are directed to the Deputy as well as to the Sheriff, or they may be directed to the deputy alone. So that the deputy is here treated as a public officer, & he makes his returns & endorsements in his own name. –

Stat. 24. 212.

And it has been decided by the superior Court in Connecticut that a Writ directed to the sheriff may be served by his general or special deputy, tho' they be not particularly described in the direction, & that whether it be mean or final process. –

Thirby. 237.

A covenant by the under sheriff not to execute process of a certain description is void as it is against law, & contrary to his duty, which is that he shall execute all process offered him. –

4 Bac. 472.
Hob. 14.

The duty of a Deputy sheriff being itself derivative cannot be delegated to another. This rule holds true in Politics as well as in jurisprudence. – The Deputy therefore must do his duty in person, tho' others may lawfully assist him. –

4 Bac. 472.

Hence it is that an arrest made by the assistant of the deputy is good. This rule however must be taken with some qualification as will be seen hereafter. – The authority given by the Com. Law when personal, & original, may be delegated but when given by Statute it is otherwise. –

6 Mod. 271.
Cokit 101. a
118.

If the under sheriff is guilty of a neglect of duty as suffering an es-

case of the sheriff may have an action on the case against him, for the sheriff himself is liable over to the Pltff. in the process. If however the sheriff has an indemnifying bond, he may bring his action on that & waive his other remedy. —

A Goaler is also the sheriff's servant appointed, & removable by him. This Goaler is a Deputy for a certain purpose
4 Co 34. viz. to keep the Goal. The sheriff is ex officio keeper of the
9 Co 119. Goal or common Prison in his County; & hence his right to appoint & remove the Goaler. —

The sheriff has regularly no right to
Hob. 202. confine his prisoners in any other place than the com. Goal
Lath. 16. or Prison, this being the place appointed by Law for their
1 Sid 318. custody & keeping. — If therefore a sheriff should confine a person ~~the~~ ~~pr~~ in a private house, or any place other than the common Goal, he would be liable to an action of false imprisonment, except where he was necessitated to do it, as if the Goal was broken open, blown down, burnt &c.

The sheriff being (as before observed) ex officio keeper of the
Kirby 48. Goal, cannot himself be arrested in any civil process. He cannot be confined in any Goal out of his County, for that would be unlawful; he cannot be confined in the Goal in his own County, for as he is the Governor or keeper of it he can set himself at liberty. If a Deputy sheriff should arrest him, he would instantly discontinue his authority by removing him from office: or if a Constable should arrest him he ~~would~~ could not commit him into prison, for this must be done by the Goaler who is a mere servant of the sheriff & removable any moment the sheriff should please to do it. —

Sheriffs.

The liability of the Sheriff for the acts or defaults of his Deputies or under Sheriffs.

96. 98. 560. 89. 10 Ent 314.

The Deputy being the servant of the Sheriff, the latter is in many cases liable for his acts and defaults; the act of the servant or under Sheriff being considered as the act of the master or Sheriff or master himself. - Qui facit per alium facit per se.

Hence it is that the Sheriff is allowed to take from his deputies security for the faithful discharge of their duty; that is, it is on the ground of the Sheriff's own responsibility to the Plff. in the process. - The security taken in the nature of a Bond to save the Sheriff harmless.

Hees. 18.

The Sheriff I have observed "is in many cases" liable for the acts of his deputy. It is a general rule that the official acts of the Deputy as to all civil purposes are the acts of the Sheriff. But for the criminal acts of the deputy he is not liable, for the criminal acts of the deputy are not constructively the acts of the Sheriff. To exemplify this distinction. If a Deputy to whom the writ is directed, refuses to execute it, in consequence of which the Plff. in the suit suffers damage, the Sheriff himself is liable. And so also for a false return. - But if after the Deputy has made the arrest he commits murder, or an assault & battery on the body of the Deft., the Sheriff is not liable, for he is never liable criminaliter for the acts of the deputy. -

Latch. 187. Cro. J. 331. 1 Ven. 338 2 Lev. 154. 22 May 1574. Dang. 422.

Again. It is very clear that the Sheriff is not liable for the

private torts of his Deputy. It is made a question whether or not the
1 Rol. 94. Cro. El. 175. Deputy, for it is only for his official acts, that he is liable, if in his pri-
1 Leon 146. vate torts he does not act as a Deputy sheriff.—

Upon the ground that the sheriff is not liable for the private torts of the deputy, it is made a question whether if the deputy un-
4 Bac. 472, 3 der an execution against A, and instead of levying the goods of A, by mistake or some other reason, levies upon
note the goods of B (the sheriff not being privy to the act) whether
3 Wils 309. the sheriff is not liable as the Deputy has not pursued his
Doug. 42. warrant; or whether the only remedy is not against the deputy.—
2 W. Bl. 832. ~~There has been no cases where this point~~, but Mr Gould thinks
See the authorities cited above that the Sheriff is liable it ought to be considered, as an unofficial act, if there are that the sheriff ought not to be liable. Unofficial, because the writ does not direct the sheriff to levy on B's goods, but on those of A. The deputy's pretending to act under authority of Law is no reason why the ~~deputy shall~~ sheriff himself should be subjected.

At Com. Law the sheriff alone is liable for a neglect of duty in
Cro. Jac. 403. in the Deputy, thus if an under sheriff or gaoler suffer an escape, neither
Esp. 603. Salk 18. of them are liable in a suit to the Pltff. in the process. but the
Cro. 89. sheriff is.— If the reason is that at Com. Law, the under sheriff nor
1 Rol. 94. Gaoler are neither of them officers known in Law.— If besides they are total stranger to the Pltff. in the process.—

But for a Tort committed by a Deputy in his official character,
Cro. El. 175. he as well as the sheriff is liable to the party injured.— The sheriff
743. Salk. 18. is liable because the tort is committed by his servant, if in his
3 Mod. 321 official character. And the Deputy is also liable Mr Gould
Cro. J. 330. East. 106. thinks, because the party aggrieved may consider the Deputy as

a mere Tort feasor. — By a Tort is meant an actual misfeasance, if not a mere non-feasance, or neglect of duty, there must be a positive wrong done if not a mere negligence one, to make it a Tort. — Thus for a voluntary escape permitted by the deputy, the Deputy himself is liable for this is an actual tort, but for a negligent escape, he is not, that being nothing more than a mere non-feasance. So also if a Deputy has an execution in his hands, & omits to levy it he is guilty of a non feasance merely. — Yet if he levy it upon a wrong person, he is guilty of a misfeasance, & he is liable, as well as the sheriff. —

3 Wils 309.
4 Bar 442
Doug. 42.
2 Wils 832

In Connecticut however the Under sheriff is liable for a neglect of duty, as well as a tort committed in the execution of his duty. & the sheriff is also liable in both cases as at Common Law. The reason of the Deputy's liability is, that he is here known as the officer of the law. the process here being directed to the deputy, he is known to the Pltff. as being a known officer, whereas in England it is otherwise, the writ is never directed to him in that country, he is not a known officer, & the process is never directed in his name. Indeed Deputies are so well known in Connecticut that they may bring suits in their own name as deputy sheriffs, against 3d persons — as is every day done by them on receipts taken for property. —

It has been once or twice observed that the sheriff is an officer keeper of the Goal in the County for which he is appointed. If after the death of a sheriff, & before a successor is appointed a person escapes, no one is liable. It is clear that the old sheriff cannot be liable for acts committed after his death, nor even his Estate —

3 Co. 72.
Cro E. 366.

for those escapes before his death, for "non ainsi auto cum persona."
If it is equally clear that the new sheriff cannot be liable for acts committed before his ~~death~~ appointment. Neither can the Gaoler be, for by the death of the old sheriff, his power ipso facto ceases. Therefore as I said before no person whatever can be made liable for such an escape. In such a case as this, if the ~~sheriff~~ prisoner actually escapes, the Pltff. in the proceed has no remedy, except by retaking the prisoner. And Mr Gould doubts whether the Pltff
1 Mod. 14. can do this till a new sheriff be appointed, as he could not be committed to prison, there being no sheriff or Gaoler in existence to receive him.

If a sheriff having begun execution, as by levying on property, is removed; he may still proceed & complete the service, for the service of the execution is an entire act. It is said that he "holds over" till he has completed the service.

Salk 323.
Cro J. 73.
1 Mod. 293
Mar. 557.

The Sheriff is not liable for the faults of a special Deputy appointed at the request of the Plaintiff.

4 Term 120
Esp. 607

Sheriffs.

"Of the authority and duty of Sheriffs."

Tho' the subject which I am now considering is entitled "Sheriffs", yet I have thus far considered under it all persons who are authorized to execute process.

In England the Sheriff is a judicial, as well as an executive & ministerial Officer. As a judicial officer he holds a County ~~Court in Eng~~ Court in Eng & presides in it.—

In Connecticut the Sheriff has no judicial power; it is principally ministerial, tho' part executive.—

A judicial officer is one that hears & determines causes, and is called a Judge.—

An executive officer is one who executes
1 Rob. 343. law by virtue of his official ~~character~~ power, without any command from a superior.—

A ministerial officer is one who executes Law under the command of a superior.— The Judges of our Courts are Judicial officers. the Governor of the State is an Executive officer. Sheriffs as before observed are principally ministerial, but sometimes executive Officers.—

McGaula will 1st. treat of Sheriffs as conservators of the peace, in which character they are purely executive & not judicial officers & 2d as ministerial officers.—

I As Conservators of the Peace they act by virtue of their
1 Rob. Rep. 237. general authority. They are the first executive officers in the County
1 Rob. 343. & superior in rank to any person therein during their continuance

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in office. Stat. Con. 384.

At Com. Law the sheriff may apprehend & commit to prison, throughout his own County, all persons who break the peace, or attempt to break it. & this he does in the character of conservator or keeper of the Peace.

He is also bound ex officio to pursue & apprehend all Traitors, Murderers, Felons and other criminals & commit them to Goal for safe custody. And he is also bound to defend the County against any of the kings enemies when they come into the Land. ~~And he is also bound to defend his bailiwick against~~ And for all or any of these purposes he may ~~demand~~ commend the "posse comitatus" & at common Law every person is bound to obey this summons who is above 15 years old & under the degree of a Peer. & if upon warning given they neglect to attend they are punishable by fine and imprisonment.

1 Bl. 343
6 Ed. 168.
4 Bac. 430.
453.

By the Statute of Connecticut, the sheriff is bound to suppress all riots, tumults, routs & unlawful assemblies, & for this purpose he may command the posse comitatus. This seems to be merely in affirmance of the Com. Law. And the same Law authorizes him to apprehend all breakers of the Peace, which is no more than the Com Law authorized him to do. This Statute says he may commend all suitable persons within his County, being of sufficient age and ability; & in case of their disobedience of his command, they are finable not exceeding $34 dollars at the discretion of the C. Court.

Stat. 384.

And the Statute has given to constables within their respective towns the same authority, that it has given to sheriffs

Stat. 384.

within their respective Counties.—

II. As Ministerial Officers. Sheriffs are bound to execute all legal process regularly directed to them, if on refusal, they are by Common Law subject to ~~force~~ fine & imprisonment, & likewise liable in a civil action on the case to the party injured.

1 Bl. 347. Plowd. 74. Dyer. 60. Stat. 385.

Our Statute also declares that when a Writ is tendered to the sheriff or other officer, he must if demanded, give a receipt for the same; in order to facilitate the proof of the fact of delivery.— And if on demand he refuses so to do, the Pltff. may call on other persons as witnesses to set their names as witnesses to such delivery. This also applies to constables in their respective towns;— It is very rare however that a receipt is demanded for an original writ.—

Stat. 385

A known officer as a Sheriff, General deputy, or Constable, is not bound to shew his writ to the Deft. before he arrests his body, or levies on his property, altho the Deft should demand it.— but as soon as he has arrested his body or taken his property, he must make known the contents of the Writ with "all convenient speed." in order that the Defendant may obtain bail or agree with his adversary.—

9 Co. 69. Cro. J. 485. Esp. 604. 8 Term 187. 8 Term. 187.

But a special Deputy Sheriff who is not a known officer or a person deputed by a magistrate for that purpose, must if demanded, shew the Writ before they make the arrest; if not demanded it need not be shewn: this showing if required is because he is not a known officer. The rule principle is this.

9 Co. 69. 4 Bar. & Ald. 452

Sheriffs.

No individual is obliged to submit to an arrest without having some evidence of the persons authority to arrest him: if therefore one should attempt without furnishing this evidence, the Deft. may lawfully resist him. In case of a known officer this evidence is furnished without shewing his writ; but in case of a special officer as he derives all his authority from that particular writ, the Writ which contains the evidence of his authority must be shewn if required.—

But in many criminal cases any individual may without warrant arrest the offender. Here the person arresting cannot shew
2 Inst. 193. 453. any warrant or authority: but still the principle is here preserved; for as to this purpose every member of society is a "known officer" with full power of authority given him by law to arrest the offender; of the law of the land which gives this authority every man is supposed to know.—

The sheriff or his Deputy may at common
2 Inst. 193 453 law command the posse comitatus if necessary in the execution of his office. This applies in Connecticut as well as in England.—

But we have a Statute declaring that in case great opposition shall be made against the Sheriff in executing lawful process signed by lawful authority, or in serving the lawful writs and processes, or in case there are suspicions that such opposition will be made, the sheriff is authorized with the advice of one assistant
Stat. 384 of Justice of the Peace to raise the militia of the County. And the Statute further declares that the sheriff shall not return "that he cannot do Execution." And all military officers of

Sheriffs.

Soldiers are commanded by the Statute to obey the Sheriffs orders. & on neglect or refusal the officers are finable not exceeding £67. & Soldiers not over £10. This is a distinct provision from the com. Law. for at com. Law all persons in the County were bound to assist; but by this statute only the military force.

The same authority is also given to Constables in their respective Towns.

Stat. 384 355.

The Sheriff is bound to execute all legal process regularly directed to him, but the execution of it must be regulated by the mode prescribed by Law. He may not therefore break open any outer door, or window of a dwelling house to arrest the body or take the goods of another; for the law considers a mans house as a castle, & the breaking might expose the family to robbery. The reason of this rule Mr Gould think very frivolous, & in fact no longer existing; & the rule remains established only by authority.—

56. 91. Cowp. 1. Ero. Ch. 909

5 Mass. R. 155.

If then an officer a Sheriff or other officer breaks the outer door, or window of a house for the purpose of arresting the body or taking the goods of another he is a Trespasser. But agreeable to a dictum in Coke, & some old authorities, the arrest is good, tho the officer becomes a trespasser. This dictum Mr G. thinks ~~is~~ highly erroneous; for that a person should argue a civil right in the violation of the law is against the fundamental principles of the science. The modern practice of the Courts of Westminster Hall is to set the service aside & give the person arrested an action ~~the~~ against the officer; & so decided in Dalromains case. Tho this question has never arisen except in this

one case. And Mr G. considers this as well as the practice in Westminster Hall as law. —

This privilege of the outer door & windows of a mansion house, is to be construed strictly, & (as Lord Mansfield says) "not to be extended by any analogous equitable interpretation". However any officer can get peaceably into the house thro' the window or door, he may break open Chests, Cocks or any inner apartments for the purpose of arresting the person, or taking the goods of the D.&c. but he has no right to break open any of them without first having demanded admittance to them. —

Cole v 2. 263. Palmer 54. Cowp. 6. 7. Com. 19. 327. Esp. 604.

This privilege of the outer door & windows extends only to the person, family & goods of the owner, or person dwelling in the house of the owner, & not to any stranger. A's mansion-house is his Castle, & not the Castle of B, & therefore B is in the house of A & the officer is refused admittance he may break open the outer door &c for the purpose of arresting him; for A's house is no kind of protection for B. — These are the principle distinctions relating to this subject as to civil process. — But Mr G. doubts the propriety of this privilege in any case. & considers it as altogether arbitrary, there being not the least shadow of reason existing for it at this time. —

This privilege extends only to the cases of civil process, & not to criminal. for if an officer has a criminal process, the mansion will not protect the criminal, he must however in this case demand admittance, before he has a right to break. Tho' the peace of the family is as much disturbed as in

96 56. 91.

civil cases, of the house as much exposed to thieves & robbers.

So also on a prosecution to compel one to find sureties for the peace or good behaviour, the officers are allowed to break open the outer doors or windows.—

12 Co. 131. Mon. 606.

So also in a prosecution for a forcible entry & detainer, which is of a mixed nature, partly civil & partly criminal, the officer is allowed to break open outer doors or windows.—

4 Bac. 455.

And in criminal cases there need not be even a warrant or known officer to justify breaking the door of the criminal, for where a person has committed a known felony, an officer or any individual with or without Warrant may break outer doors & for the purpose of arresting him & even demolish the house if he cannot be taken without.

2 Hawk. 86.

But in order to make a known felony the offence must be defined, or at least be defined as it is named in the books.

So also to suppress an affray, or to prevent a breach of the Peace, any officer or private individual may break into the house where it is

So also if the "affrayers" escape & are immediately pursued by an officer of the Peace, outer doors &c may be broken to arrest them.—

4 Bac. 456. 1 Root 66.

So also in a Writ of seizin or "habere facias possessionem" in ejectment, the Sheriff may justify breaking the outer door & windows of the house, & admission be denied him; for the Writ commands the officer to turn all persons out, & put the Plff. into full & actual possession, consequently the Sheriff has all power necessary for the purpose. Besides in this case the Law does not consider the house as belonging to those in possession, but

56 Co. 91.

to the Deft. in the process, for he has had a determination of the Court in his favor.—

So also in any civil process the door of a Barn
1 Sid. 186 not adjoining the house may be broken open. Mr. C. thinks
1 Keb. 698. however near the Barn may be, if it is not a component part of the dwelling house, it may be broken open. It has been contended that the store of a merchant is privileged, but Mr. C. thinks that unless it is under the same roof with the mansion house it may be broken open.—

If the Sheriff's bailiff having entered the
Palm. 52. house lawfully, is locked in, the Sheriff may justify breaking
Cro. J. 555. the door open for the purpose of setting him at liberty.—

So also if a person after having been actually arrested, es-
Palm. 54. 1 Rod. Rep. 13 capes into his house, it affords him no protection, for as he is an
6 Mod. 173. escaper, the outer door may be broken open to retake him.—
4 Mod. 456. This point has been decided in Eng. in a very strong case. A Deft. opened the window to converse with the Officer, & the latter touch'd him, this was adjudged to be a good arrest, & the officer therefore justified in breaking into the house to retake him.—

Tho' in ordinary cases the an arrest made by breaking open the outer doors or windows of a dwelling house is illegal, yet if while in such illegal custody the deft. is fairly charged with another arrest, such last arrest shall be good; but there must be no fraud or collusion first to arrest the party unlawfully & then charge him with another action.—

Salk. 78. By the English Statute 29 Car. 2 & by a Statute of Conn.t

Mr. C says that the officer may open the window or outer door if they are not fastened & is not obliged to break in order to be able to enter, whether any body is in or not.

Sheriffs.

It is provided that no civil process shall be served on
4 Bac. 456. Sunday; therefore any civil process served on that day is utterly
Stat. Car. 370. void, the officer serving it of course guilty of false imprisonment,
6 Comb. 95. & the person arrested relievable by Habeas Corpus.

But where a person actually is in custody, escapes, he
2 Roy. may be retaken on Sunday by virtue of an escape warrant,
1028. for the retaking is nothing more than the means of contin-
6 Mod. 95. 253. uing the officers custody.—
Salk. 606.

The subject naturally leads to the law of Escapes, which will here be considered.—

An Escape is where a person being under a lawful arrest, & restrained of his liberty, either ~~voluntarily~~ violently or secretly evades such arrest, or is suffered to go at large without due course of law.—

It is essential to the existence of an escape, that there be an evasion of a previous legal arrest.—

Of the general nature of Arrests.—

Every arrest in civil cases must be made in pursuance of law-
4 Bac. 455. ful authority; an arrest therefore made without this authority is absolutely void & no arrest at all.—

~~of a writ or warrant~~ Where an arrest is made by virtue
Sha. 509. of a writ or warrant, the rule is thus, if the Court from whose au-
5 Co. 64. thority the writ issues, has jurisdiction of the subject matter, the
8 Co. 141. b
Moor. 274. arrest is lawful. It follows then if the person so arrested, is suf-
2 Wils. 384. fered to go at large without due course of law, it is an escape.
On the other hand, if the Court from which the writ issues, has no ju-

risdiction of the subject matter, it follows that the arrest made under it, is void; if so the Deft. going at large, does not amount to an escape, & the officer first making the arrest is guilty of false imprisonment. – Examples: Suppose a single magistrate in Connecticut issues a writ for an assault an battery demanding more than $15. & returnable before himself, then it appearing upon the face of the writ that the Court has no jurisdiction of the subject matter, the arrest will be void. – But if the demand of damages is $15, or less, & there should be a misnomer in the writ, yet the officer must serve it & the arrest will be good, for the Court has jurisdiction of the subject matter. –

Moor. 274
2 Wils 384.
Sha. 509.
5 Co. 64.
8 Co. 141.

The above distinction, however is not universal, for there are certain cases where the Court has complete jurisdiction of the subject matter, yet the arrest will be illegal & void; as if the process has no signature of a magistrate affixed to it. – & so in Connect. if there is no certificate of the duty having been paid; here the arrest under the process being void; the prisoner's going at large is no escape.

Esp. 328.
3 Wils 341.
1 Root. 315

So also if before the time of making legal service for the next Court has expired, the officer should serve a writ returnable to a more distant Court, such service would be illegal & void; for no Deft. is permitted to over-leap a Court. It follows then that the Deft's going at large is no escape. —— The rule laid down in the 2 & 3 instances under this head presupposes a good writ, & therefore the 3 examples just mentioned are being exceptions to the rule are more properly qualifications. –

In Connecticut mesne process does not usually issue from the

Court applied to for redress; tho it sometimes does, & always may. Most of the Writs returnable to our County Courts are signed by single magistrates, but when but before a single magistrate, they are usually signed by those who hear them. —

The general rule of Com. Law therefore is not sufficiently ~~large~~ broad to reach all arrests on mesne process in our practice. The general rule of Com. Law is predicated on the English practice where the same Court issue the writ who try it. — So far as the Com. Law rule extends, it applies & is ours. — There then, "if a Writ is issued by competent authority, & returnable to a Court having jurisdiction of the subject matter, the arrest is legal" & the going at large, is an escape. As if a Justice of the Peace in Litchfield County issue a Writ to be ~~returned~~ served in the County, & returnable before the County Court of the same County. —

But on the other hand if the process is issued by incompetent authority, or returnable to a Court not having jurisdiction of the subject matter, the arrest is void & of course the going at large is no escape. — If the Prisoner is redegoned up during the life of the Execution in the first case, it is no Escape. —

At Com. Law an Officer having made an arrest on final process cannot delegate to a stranger a right to hold the prisoner in custody, during his own absence. If therefore the officer does attempt to delegate this ~~authority~~ right he is guilty of an Escape; for in contemplation of law he has set the prisoner at ~~large~~ liberty. — This point has been recently

decided in England. It is uncertain however, what the decision would be here, if the question should arise; but it is presumed it would different from what it is in Eng: inasmuch as our practice is directly in opposition to the principle established in the English decision.—

Bosanqt & Pullen. 24.

Two things (as has been observed) are necessary to constitute a good arrest. First it must be in pursuance of lawful authority, & secondly it must be 1st an actual arrest, & 2d a regular arrest, or there can be no Escape. The first of these two requisites, viz, "that it must be made in pursuance of lawful authority" has been treated upon. The second will now be considered; ~~upon~~ &

I.— There must be an actual arrest. Bare words will not make an arrest. there must be an actual touching of the body, or what is tantamount to it, a power of touching immediate possession of the body, & the party's submission thereto: & therefore where the Officer said to the Deft. he being at some distance that he arrested him by virtue of a Warrant he had agt. him; & the Deft. having a fork in his hand kept the Officer at a distance till he retreated into a house, it was held to be no arrest. But where the Officer met the deft. on horse back, & said to him, "you are my Prisoner" upon which he turned back & submitted, this was determined to be a good arrest, tho the Officer never laid hand on him, but if on the officer's saying those words he had fled, it would have been no arrest, unless the officer had laid hold of him.—

1 Salk. 79. 586. Esp. 604. B.N.P. 63.

If while one is under an arrest at the suit of — & in the

the custody of the sheriff, a writ at the suit of B is delivered
5 Co. 89. to the Officer against the Deft. this delivery ipso facto amounts
Salk 237. to an arrest on the last suit, or in other words the Deft. is considered as immediately in custody under B's suit. If therefore after such delivery the Deft. goes at large, B may have an action against the officer for an Escape.—

II. An arrest must not only be actual, but regularly & legally made, otherwise generally speaking — there can be no Escape.
Esp. 604. Thus in all civil cases the arrest must be made by virtue of a
Comp. 64. legal Writ or warrant; & if there is no writ or warrant, the arrest is not legally made, tho it may be said to have been actually made.—

The strict rule of the Com. Law requires also
Comp. 64. that the arrest be made by authority of the officer to whom
Esp. 604. the writ is directed; i.e. the officer must be in company, but he need not be the hand that arrests, nor present, nor in sight of the party arrested — as where the officer sent his assistant forward, who made the arrest he being at some distance & out of sight, the arrest was held to be good. It is sufficient if the officer is near at hand, & in pursuit of the same object.—

An officer is not liable for an Escape of one who is arrested on Sunday; for the arrest on this day being void there can be no Escape.—
Esp. 605.
2 Bac. 236 note.
6 Mod. 75.
Salk. 78.

— So it seems if the arrest is made by breaking an outer door,
Esp. 604, 5. or window, it is void, & therefore Mr. G. concludes the prisoner's going at large is no Escape. This is not a settled point tho it seems to follow necessarily from the arrest's being unlawful.

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Tho there can be no Escape where there has been no pre-
2 Mod. 23. 24. vious arrest, yet the officer is in many cases liable for not
2 Ray. 331. making an arrest when he might have done it. If therefore
10 Mod. 251. an officer having an opportunity, neglects to do it, he is lia-
2 Bac. 236. note. ble to the Pltff. in an action on the case. Tho the Deft. should
1 & 2 Esp. Rep. 475. have an opportunity to arrest the Deft., if omit to do it at that
477. particular time, yet if he afterwards arrests him he is not liable.

Of Escapes.

Escapes are of two kinds; Voluntary and Negligent.
1 Rol. 186. Every person committed to prison is to be kept in safe custody.
3 Co. 47. If then the sheriff or keeper suffers the prisoner to ~~escape~~
Plowd 36. leave the limits of the prison even for a moment it is an escape. A subsequent return of the prisoner makes no difference. the
See Gill & E. 572. officer is still liable, he is guilty of a tort, if nothing ex post facto will discharge his liability.
for the doctrine of Escapes.

A Voluntary Escape is one which takes place with the consent of the Gaoler or of the officer making the arrest. If therefore a sheriff arrests a person upon final process, if permits him to go at large before commitment for a moment, it is a voluntary Escape. The same if the Gaoler permits after commitment. Mr Justice Blackstone
3 Bl. 415. definition is not sufficiently broad, for it includes only such escapes as are from the prison only, if not those before commitment.

A Negligent Escape is one which

happens without the consent or knowledge of the Gaoler or officer making the arrest.—

I. Of Voluntary Escapes. If a Sheriff or Gaoler admit to bail one who is not by law bailable, he is guilty of a voluntary escape. And if the sheriff or Gaoler suffer the prisoner to step over the limits of the prison or yard, but for a moment, tho' he has a keeper with him, still he is guilty of a voluntary escape.— If he can permit him to go out of the limits for a moment he may for a day or a year. If he can permit him to go a foot over he may a mile or 10 miles. The object of imprisonment on civil process is not for a punishment, but a convenient mode of compelling the Deft to discharge his debts, & for this reason it is that his transcending the limits is considered as an Escape. Imprisonment on final process is here contemplated.—

2 Term Rep. 172.

If the officer after arrest on final process permits the Deft. to go out his custody for a moment, he is guilty of a voluntary escape, for if the arrest is interrupted for a moment, it may for a day & if for a day, it may for a year.—

2 Term. 176.

1 Bosang & Pullen 26.

Persons committed to prison on criminal process are to be kept within the walls of the prison. But those committed on civil process may on procuring security to save the sheriff harmless, at his discretion ~~discretion~~ go at large within the limits of the prison-yard: which limits are fixed in each County by the respective Courts of Com. Pleas, & any slight transgression of these limits will be an escape.—

2 Ind. 5. the Sheriff is obliged to admit to the liberty of the yard.

Sheriffs.

It has been once decided in England that if one confined on final process, is brought up to Court on a Habeas Corpus ad testificandum the officer is guilty of a voluntary escape. — Mr Gould considers this one of the most remarkable decisions which ever entered the human mind. — Monstrously absurd!! does not the Comm Law clearly allow such a writ? Does it not compel the sheriff to execute it? & can it be possible that the same law should adjudge him guilty of an Escape in doing an act which he is compellable to do. —

1 Sid. 13. B.N.P. 72. 1 Root. 72.

But if the officer who thus brings up a prisoner on a Writ of habeas corpus, grants him any unnecessary leave or liberty, he is guilty of a voluntary escape. The rule is he must bring the body to the Court in a convenient time & in the most reasonable way. — If a writ is issued by the superior Court sitting in Litchfield County to bring up a prisoner from ~~the~~ New Haven Gaol, & the sheriff goes round by New London or Hartford, he would be guilty of a voluntary escape. —

3 Keb. 305. 2 Phoy. 241. 399. 788. Croc. 14. 6 Mod. 78.

The same or a similar rule obtains where an officer has made an arrest on final process, & has not committed the Deft. but indulges him with an unreasonable time; here he is guilty of an Escape. —

So also if after arrest, & before commitment the officer suffers the prisoner to go ~~at large~~ abroad with a keeper, he is guilty of an Escape. —

1 Bos. & Pull. 24. 2 Sam. 176.

It is a rule of the Comm Law that if the sheriff marries a woman committed on Execution, he is guilty

Plowd. 17.

Sheriffs

of a voluntary Escape; & it is of no avail for him to attempt to prove that he has kept her in confinement, all such testimony being inadmissible. —

If a prisoner having the liberty of the Goal yard manifests a disposition to escape as by once hauls grazing the limits, it is the duty of the sheriff to recommit him to the Walls of the Prison, & if he does not he is guilty of a voluntary escape. Notice however of that disposition must be given by the ~~Sheriff~~ Creditor to the sheriff. —

If the prisoner who has the liberty of the yard escapes before he has manifested any such ~~suspicious~~ disposition, the sheriff is guilty of a negligent escape only. —

1 Root. 106, 7. 127, 8. —

The sheriff is never bound to grant the liberty of the Goal yard, tho' a bond of indemnity is offered to him, yet he may do it being a mere matter of discretion with him, & if he does, it is at his peril, & he must rely on his bond of indemnity in case of an Escape. There is a prevailing idea in community that the sheriff is bound to grant the liberty of the ~~prison~~ yard where sufficient bonds are tendered, but there is no common Law or statute Law requiring him to do it, but as I before remarked he may do it if he pleases, & hence the bond which is taken is valid in Law. —

If a sheriff has actually admitted a prisoner to the liberty of the yard, he may at any time he pleases, recommit him to the walls of the prison without assigning any reasons for so doing. — A sheriff may justly that he retook the ~~the~~ Ca. Sa. before the return of the writ in mesne process tho' he had voluntarily permitted him to go at large after the first arrest. 2 S.R. 172

Sheriffs.

II. Of Negligent Escapes.

These are such as happen without the consent of the sheriff or officer keeping the prisoner. Thus if the prisoner evades his restraint by fleeing from the officer without his consent, or by beating the officer or using any violence towards him, it is a negligent escape so also if he escapes thro' the insufficiency of the Gaol it is a negligent escape. Indeed if the prisoner escape in any way the officer not consenting it is a negligent escape.

3 Bl. 415. F. N. B. 130.

There is in many particulars a difference between escapes on mean process, & on final process.

If one arrested on final process is permitted to go at large even for a moment, the Officer is guilty of ~~voluntary~~ Escape. And it makes no difference whether the Deft. is merely arrested & not committed to prison, or whether he is actually committed to prison, it is in both cases an escape.

Esp. 605. 2 Term 172. 3 Bl. 415.

But at Com. Law a person arrested on mesne process, & not actually committed to prison may be permitted to go at large without subjecting the officer, provided the has the prisoner forthcoming at the return of the Writ. An arrest on mesne process is merely the means of compelling the Deft. to appear in Court. His custody is not intended as a coercive means of obtaining payment, but simply to secure the Deft. to hold him to bail. The custody of a person arrested on final process is intended as the coercive means of compelling the

2 Wils. 295. 2 W. Bl. 1049. Esp. 606. 3 Bl. 415. 2 Term 172.

Deft to discharge the Deft, & therefore if he is permitted to go at large a moment, either before or after commitment, the officer is guilty of an Escape.

In Connecticut the rule is still more liberal, for here in cases of arrest on mesne process, the officer is not guilty of an escape in permitting the prisoner to go at large, if he has him forth coming during the life of the execution.—

Hat Con 39
Kirby 209.
3 Ba 434.

But if the Deft thus arrested on mesne process is not forth coming during the life of the Execution issued on the Judgment, the officer is guilty of a voluntary escape. And at Com Law the Officer is guilty of a voluntary escape if the prisoner is not forthcoming at the return of the Writ.—

2 Ro Ab 807.
Cro C. 623.
652. 868.
2 Wils 294.

The two last rules hold only in cases where the person arrested on mesne process is not actually committed to prison; for if the person arrested on mesne process is actually committed to prison, the permitting him to go at large but for a moment is a voluntary escape.

Esp. 610.
Shin. 582.
Salk. 271.
2 Wils 294.

We have a Statute in Connecticut in affirmance of the Common Law on this subject.—

Stat. 272.

Thus we see the principal difference between an Escape on final & on mesne process is, that the former is followed up by a commitment, whereas the latter is not. What will amount to an escape on final process before commitment, will not on mesne process. Where the arrest on mesne process is succeeded by a commitment to prison,

and the prisoner is afterwards suffered to go at large, the Plff does not by pursuing up his original action against the Deft. waive his right of action against the sheriff if the prisoner keeps out of the way.—

2 Wils. 294.

The Plffs remedy agst. the Sheriff when the Deft. arrested on mesne process escapes, is by a special action on the Case.— In this case the damages are merely presumptive, they not being liquidated by Judgment; therefore are to be proved — In Connecticut this action may be commenced against the sheriff or any of his subordinate officers guilty of the Escape.—

2 Wils. 295
2 Sum. 129.
4 Co. 11.
2 Sha. 873.
Cro. El. 17.

For an Escape on final process the Plff. has his election of 2 remedies agst. the Sheriff; he may at Com. Law maintain an action on the case; or he may by virtue of two ancient English Statutes of Westminster 2d & of Rich. 2d bring an action of debt against him.—

2 Ld. Ra. 110.
2 Sum. 129.
2 Ld. Ra. 1048.
Sha. 153.

But there is a material distinction between the rule of damages in these two actions. If the Plff. brings an action on the Case agst. the Sheriff, the Jury are at liberty to give what damages they please either the whole debt & cost, or what they consider his special damages to be.— If these special damages may amount to the whole debt and cost as the case may be.— If the Escaper is not amenable to the process of the State & as where he keeps out of the way, the Jury will give the whole debt & costs.—

But if the Plff. elects the action of debt agst. the Officer, the Jury are not at liberty to give part as they please, but

2 Sum. 126.
2 Wils. 128.

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2 Wils. 129. 2 Wils. 148. must give the whole sum for which the prisoner was charged in the original execution.—

The Statute of Connect. seems to require that in case of a voluntary Escape from Stat. 222. sec. 16. the prison, whether on mean or final process, whatever the form of action may be, the Pltff. ~~and~~ on the original process shall recover the whole sum for which the Deft. was charged in the original process. If this construction be correct, the Statute gives the same damages on voluntary Escapes, as are given in England for Escapes on final process.—

Of Rescues.

If one arrested on mesne process but not actually committed 3 Wils. 416. to prison is rescued, the officer is excused in England. And Cro. J. 419. Cro. E. 873. if he be sued for an escape he may plead his return in Esp. 610. bar, as by way of justification. & the reason given in the books is, that on mesne process he is not supposed to have the posse comitatus then with him.—

But where one is arrested on final process, a rescue is no ~~escape~~ excuse. for in serving final process he is supposed to have the posse comitatus with him.— Why may you not as well suppose the posse comitatus with him in serving mesne, as well as final process?

But if after a Deft. ~~committed~~ arrested on mesne pro- 1 Wils. 84 a cess is committed to prison, & then rescued it is no excuse Esp. 610.

unless the rescue be by public enemies. — A rescue by traitors or rebels is no excuse for the Officer, for he is supposed to have the power of the County near enough to be at hand to resist them. — Thus in the case of Lord George Gordons riot, it was found necessary to make a special act of parliament to save the sheriffs of the prisons from the actions of the Creditors, whose debtors were set at liberty thereby. —

1 Rol. ab. 808
1 Sha. 482.

This rule obtains after commitment whether the arrest was on mesne or final process. If the arrest was on final process it holds equally true as well before as after commitment, but on mesne it holds true only after commitment. —

In those cases of rescue of an arrest the Officer is not barred or excused, the Plff. has his election to sue either the officer or the rescuers. But Messrs. Gould & Espinasse suppose that if he elects to proceed agst. the rescuers, that he waives his action agst. the sheriff; for by commencing an action against the rescuers he ousts the sheriff of his right of action against them, & on this ground it is that these two gentlemen claim he ought to be discharged. —

Esp. 660. 657. 659.
6 Mod. 211
Cro. C. 77. 109.
Hutt. 98.

The proper action against the rescuers is an action against the sheriff on the Case; tho' some Books say either trespass or Case. — This is not true; but this is not true. Trespass & case are never concurrent; & it is by fiction of law that trover is ever concurrent with Trespass. Trespass on the Case, & Trespass vi et armis, can-

Cro. J. 486.
Rob. 180. contra.

not from their very nature be joined concurrent. Trespass on the case therefore is the only proper action. The Case of Hobart 180 clearly is not law.—

In an action against the rescuers by the original Pltff., the jury may give in damages either a part or the whole of the Pltff.'s original demand. If they give the whole then the Pltff. is satisfied, & cannot proceed against the rescued; but if they give only a part, then he may pursue his action against the original Deft. for the remainder.—

Esp. 657, 9 6 Mod. 211

In all the foregoing cases the party rescued is a good witness against the rescuers, & tho' a participes criminis, if the Deft. be found guilty, yet shall this go only to the credit & not to his competency.—

2 Vent. 170. 1 do. 224. Comb. 295. Doe 212. Croke 781.

When there is a rescue of one arrested on mesne process, in an action against the Officer, his return of a rescue is conclusive evidence upon the Pltff. tho' it is done by the Deft. & is evidence in his own favor.— Yet the Pltff. may institute an action against the officer for a false return, in which case the Pltff. will recover if he can prove a false return.—

In Connecticut they permit the official returns of an Officer to be contradicted by common parol evidence. So that McGould supposes that the same rule does not obtain here, as officers returns are not conclusive upon the Pltff.—

If however the Officer returns a rescue, & upon this

return, he recovers of the rescuers, they may in an action against the Sheriff for a false return, prove that there was no rescue. — 1 Vent. 224. 2 do. 175. —

Cro. 781. Y. 212. Comb. 295.

It is laid down in the books that the Sheriff may have an action against the rescuers. But Mr Gould considers that this obtains only where he is liable over to the Plff. in the process. — If as on mesne process he is not liable to the Plff. he cannot maintain an action agst. the rescuers. — There is no instance to be found where the Sheriff has ever sued the rescuers for rescuing one arrested on mesne process. —

Cro. 77. or 109. Hutt. 98. Hob. 100.

If a Sheriff brings out a prisoner on a Writ of Habeas Corpus, a rescue is no ~~escape~~ excuse, whether he was committed on mesne or final process. If the reason assigned is, that the Sheriff having had notice when the body was to be brot. up, might have guarded against a rescue by assembling the posse comitatus. —

Esp. 610. Sho. 482.

It is a general rule that after a person arrested on final or mesne process is committed to prison, nothing but the act of God or public enemies will excuse the Sheriff in case of a rescue, in the latter instance, of an escape in the former. It is laid down in Barnes Abridt. that fire will excuse him, but this is not Law, for a great weight of authorities is to be found in contradiction to it. — This seems to have been the idea in Parliament at the time of the great fire in London in 1666. for they

4 Co. 84. 4 Term 789. 2 Rol. 113.

conceived it necessary to pass an act excusing the Sheriff from all liability to Creditors for Debt of their imprisoned Debtors as were set at liberty by means of the fire. — This point has likewise been recently decided in the Supreme Court of the State of New York who held that fire occasioned otherwise than by lightning will not excuse the Sheriff. —

Of the difference between the consequences of a Voluntary and Negligent Escape. —

It was anciently holden that in case of a voluntary
Hob. 202 Escape on final process the prisoner was absolutely discharged of the debt & his liability devolved upon the
1 Sid 330 Sheriff. — This was an unanimitable rule & is clearly
1 Show 174. not Law, for the Pltff as the nature of the Case may require,
1 Vent. 4. 269. may have a new action of debt against the Deft., i.e.
2 Mod. 136. an action of debt founded on the judgt. on which he
3 Bl. 415. was originally committed, or a scire facias & upon
Esp. 611. this a new Execution, or by the Statutes 8 & 9 Wm. 3.
he may have a new Execution against the prisoner, or if none of these proceedings are necessary, he may retake him on the old Execution. —

If the Sheriff per-
Esp. 611. mits a voluntary Escape when the Deft. is arrested on mes-
2 Wils. 295. ne process, the Pltff. may have him retaken on an Escape
5 & 6 Ed. 6. warrant, tho' the Office cannot, & this warrant may be

directed to any person. The reason why an Escape warrant is necessary is, the original process must be returned to Court. — But if the Sheriff is guilty of a voluntary escape on final process, the Plff. may retake the Deft. on the original Execution itself: for in this case it is not necessary that it be returned; or he may have a new Execution & retake him, or have a Scire facias, or he may have an action of debt against him; which last is frequently preferable, because in this he may recover Interest on his Execution, whereas in the other cases he cannot. — Mr. G. thinks that in neither of these cases escapes warrants are used in Connecticut. The usual practice here is for the Sheriff or keeper of the prison immediately to pursue the Escapee with or without the process, or advertise him & have him arrested, in which last case any one may retake him under the advertisement, or he may pursue both modes at the same time. —

2 Sum. 176 3 Co. 52. 3 Bl. 415. 1 Sid. 330. 2 Str. 176.

In all Escapes on mesne process which are voluntary, the Officer permitting the Escape, after commitment, cannot retake the Escapee, for they he is particeps criminis; & besides it is a settled maxim in the law that no person can acquire a right out of a wrong or violation of law by himself; "ex dolo malo non oritur actio" — the officer may retake him before the return of the writ

Carter 212. 1 Mont. 269. 2 Sum. 176.

Indeed if after a voluntary Escape, the Sheriff or Gaoler retake the prisoner, he is guilty of false imprisonment & it is a clear rule of law, that a Bond taken by the

1 Paw. Con. 196, 7. 1 Co. 100. 2 Buls 213. Sheriff to save himself harmless from the consequences of a voluntary Escape is void, as being against Law, it being given to induce the commission of an offence. Indeed it is a universal rule, as applied to Contracts, that an undertaking to do an act in violation of law is utterly void.—

When the Escape is negligent, the Sheriff may retake the prisoner, or he may have an action on the case against him, because he is immediately liable over to the Plff. in the action.— By this the Sheriff may do before the Plff. commences a suit against him.— Or in this case if a Bond has been given to the Sheriff to secure him against the consequences of a negligent escape he may sue upon the Bond, for the bond is allowed to be good by law. So that in this case the Sheriff has 3 remedies. And it has been decided in Connecticut that a person escaping may be retaken on an Escape warrant in another State from that in which he was committed to prison.—

6 Co. E. 234. 2 Co. 53. Esh. 612, 13. 3 Co. 52. b. 1 Root. 107.

If one arrested on criminal process, escape he is punishable by fine & imprisonment, & if in doing it he breaks the prison, he is at Com. Law guilty of a felony.—

2 Hawk. 222 128.

An Officer who after arresting a felon, suffers a negligent Escape, is punishable by fine, as having been guilty of a misdemeanor. But if he has been guilty of suffering a voluntary Escape, he is punishable as the crim-

4 Bl. 130. 1 Hawk. 590. 2 do 154.

inal himself is. — If the Escapee was a murderer then the Officer is to be punished as a murderer. But if the Escapee cannot be found, the officer is only punishable by fine & imprisonment; for it would be unjust & improper to punish an ~~Escapee~~ accessory for what the principal himself has never been convicted of. —

In case of a voluntary escape, ~~the~~ the Sheriff has been compelled to pay the debt to the Pltff. Mr G. does not see why he may not maintain an action of Indebitatus Assumpsit against the Escapee, as for money paid laid out & expended for the use of the latter. — And it has been twice decided at Nisi Prius that when the Escape was voluntary on the part of the ~~Officer~~ Deputy, Esp. 612. if the Sheriff has been sued & compelled to pay over the debt to the Pltff. in the original process, that the ~~Officer~~ Sheriff may maintain the action of Indebitatus Assumpsit. But in two subsequent cases L. Kenyon has decided, the above decisions Peake Rep 146. not to be law, on the ground of officers being particeps criminis. Mr. G. thinks the two decisions at Nisi Prius Esp. Rep. to be the most correct; one of which was by Justice Gates a very able Lawyer, & the other by Mr. Justice Gould. —

The Sheriff ought to have an action in this case for he has been compelled to pay money for the Escape which in Equity & good conscience the latter ought to refund to him. — All the objection is that the Sheriff has been guilty of a breach of Law, or an offence. The Sheriff has com-

mitted no offence. This under Sheriff does it is true; but is it not clearly settled that no acts of an under Sheriff shall affect the Sheriff criminaliter.—

If after a negligent Escape the Sheriff retakes the prisoner on fresh suit (by which is meant a retaking before the Plff. commences an action agst. the Sheriff) his liability to the Plff. is discharged. Where a Sheriff retakes on fresh suit in England, if an action is afterwards brought against him, he must plead the retaking specially; but in Connecticut he may give it in evidence under the general Issue.—

Sha. 908. Esp. 607. 3 Co. 44. 52. 1 Vent. 211. 217. 2 Sem. 126. 1 Root. 106.

But if the original Plff. commences his action against the Sheriff before recaption, a subsequent recaption will not excuse him; for the Plff. by commencing his action attaches in himself a right of recovery, & no subsequent act of the Sheriff can oust the ~~Sheriff~~ Plaintiff of this right.—

Cro. E. 657. Sha. 873 Cro. J. 657. 3 Co. 52.

But a voluntary return of the prisoner before action brought by the Plff. against the Sheriff, discharges the latter; for this is equivalent to a recaption on fresh suit.—

2 Sem. 126. Com. Rep. 554 1 Bosang. & Pullen 415.

But in case of a voluntary Escape on final process, a recaption in fresh suit, does not excuse the Sheriff: for in case of a voluntary Escape he has no right whatever to retake. Neither will a voluntary return into custody before action brot. discharge the Sheriff from his liability, for this is only equivalent to a recaption on fresh suit.—

5 Co. 52. b Esp. 611, 12 2 Wils. 299

And the rule is the same tho' the escape was on mesne

Esp. 611, 12.

2 Wils 294. process, if he escaped from prison. —

It is said that the Sheriff has no right to discharge a prisoner committed on Execution even ~~for~~ upon payment to himself, of the contents
Cro El. 404. of the Execution, for the benefit of the Pltff., if therefore he does
1 Mod. 194. receive the amount of the Execution, & discharge him, he is
8 do. 225. 366. guilty of a voluntary escape. If the reason assigned is, that it is the duty of the Sheriff to keep the Deft. in safe custody untill he is discharged by due course of Law, for the Sheriff is not an agent of the Pltff's to receive his monies, but an Agent of the Law. — Mr G. observes however as a consequence of this rule, that if the Sheriff should pay over, or tender the whole amount of the Execution to the Pltff., that on action brought by the Pltff. against the Sheriff, only nominal damages would be recovered. —

The Escape by a prisoner having the liberty of the yard, it being a negligent one, a retaking on
1 Root. 127. fresh suit or a voluntary return before action brot. against the Sheriff, will save the latter's liability. —

But in these cases i.e. in cases of a retaking on fresh suit, or a voluntary return before action brot., the Sheriff may recover
1 Root. 127. nominal damages on the Bond of indemnity given for security of the prisoner; if the reason given is that the condition of the Bond is broken. —

And after a prisoner has thus
1 Root. 128. escaped from the limits of the prison yard, neither he nor his Bondsman can compel the Sheriff to receive him into custody

again tho' the Sheriff may do it if he pleases. If the reason why the Sheriff is not compellable to rescue him, is that he has been guilty of a wrong, & thereby subjected himself to an action.—

But after the creditors remedy against the Sheriff
1 Root 151. is barred by the Statute of limitations, the Sheriff cannot subject the prisoners Bondsman, for the debt due on the obligation, in case of a negligent escape.—

The Bondsman therefore may be relieved by Curiata Querela against the debt on a Judgment recovered against him for the escape
1 Root. 151. of a prisoner; where the original Creditors right of action is barred against the Sheriff by the Statute of limitations.—

Under the Count for a voluntary escape against the
1 Vent. 211. 217. Sheriff, the Pltff. may give in evidence a negligent escape, &
2 Bac. 248. 2 Sum. 126. that will support the declaration, & the deft. on his part may plead to a voluntary Escape, any defence that he might to a negligent Escape, & this without traversing.—

This mode of pleading is not used in Connecticut. there a voluntary Escape is declared on as such, & a negligent Escape as a negligent one.—

For a voluntary Escape, the under Sheriff or Goaler, is liable as well as the Sheriff himself.— But for a negligent escape, the Sheriff only, is liable.—
Esp. 603. Comp. 405. 406. The rule is the same in England as to the Sheriffs & their Deputies

If then the creditor or Pltff. in the Execution sues the Go

ales for a voluntary Escape, as he may do, the Sheriff it
Esp 602. seems, is of course excused.—

If after an action of Debt brot. against
8 Co 142. the Sheriff for the Escape of a person committed on Execution,
Hob. 209. if before plea pleaded, the original Judgment on which
3 Mod. 325. the Escaper was committed is reversed, the Sheriff may
plead nul tiel record, & thus save his liability.—

But after Judgment rendered & Execution actually issued against the Sheriff, a reversal of the original Judgment will not release the Sheriff from his liability.—

False Returns.—

If a Sheriff make a false return, he is liable to an action
1 Wils. 351. on the case in favor of the party injured by it; & this rule holds
336.
Esp. 615. true not only as to Sheriffs but to any public officers serving under them.—

If the Sheriff make a false return, when he has actually made no service on the Deft, the latter may maintain an action against him.—

In Connecticut when a false return is made the Defendant may plead it in abatement, & the Pltff. being in this case the suffering party, may have an action against the Sheriff for such false return.—

The foregoing rule on this subject is, "that in all cases of a false return the party injured whether Pltff. or defendant, has a right of action against the officer making such illegal return."—

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Cro. El. 729. If the Sheriff make a false return of "non est inventus"
1 Sha. 650. Esp. 615. the Plff. may maintain an action on the case against him.

As to Escapes thro' the insufficiency of Goals, our Statutes
Stat. Con. 220. has introduced a law unknown to the Com. Law. Here
1 Root. 450. if a prisoner escape thro' the insufficiency of the Goal the County & not the Sheriff, is liable.—

Under this Statute an action
Kirby 318. for such escapes is is not an action at law, but by an ap-
1 Root. 158. plication to the County Court in the form of a petition, and
275, 8.
450. 505 if the petitioner is aggrieved by their decree, he may have
2 Root 30. an appeal to the Superior Court. The reason why an action will not lie at Law is, that the form of the Statute is such as to preclude that mode of relief; & besides a County is not suable at Com. Law.—

In general, however, the liability
Kirby 308. of the County under an Statute is nominal only, for it
1 Root. 125. 155. has been decided that if the prisoner escaping, is respon-
278. 357. 505. sible, the Plff. must pursue him & not resort to the County; & if he is not responsible the Creditor can have lost nothing by the Escape, therefore the County ought to be only nominally liable; & indeed special damages are all that that is given.—

There is one class of Cases in which Mr. G. thinks the responsibility of the County is substantial. Thus: where the prisoner escaping is responsible, but by means of the Escape defeats the Plff. of his remedy which would otherwise have been effectual. In this Case it is

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Mr Gaulds opinion that the County would be liable for the whole debt.—

The Sheriff as well as the County is liable for
Hal. 224 an Escape thro' the insufficiency of the Goal, if the escape was actually practiced by any out in him or the Goaler.—

Miscellaneous Rules.—

If a Creditor voluntarily discharges from custody a Debtor taken
4 Burr 2482 on in Execution whether committed or not, he cannot even afterwards retake him, or enforce any other remedy against him;
6 Term 525.
1 do 557
Hea. 653. & the reason is, that the imprisonment is in satisfaction of the debt, & the Creditor by ~~when~~ discharging him relinquishes all further claims.—

And tho' the Pltff should discharge the Debtor in consideration of a new promise to pay the Execution; yet
1 Term 557.
557
6 do 525.
7 do 420.
Burr. 2482. he cannot retake him on the Execution; ~~nor~~ but he can maintain an action on the new promise, or bond taken for this purpose, but cannot ~~nor can~~ enforce the original Judgment.—

If the new agreement made by the Debtor in consideration of his discharge, should be defeated by himself when sued upon
1 Term. 557. it, for some informality in the agreement, the original debt
6 do 525. is thereby extinguished, & the Deft remains no longer liable on the original Judgment.—

And it is now a settled point that
1 Bosanq & Pullen 242. a Bond conditioned for the rendering in Execution a prisoner once taken upon it & voluntarily released, is void as being against Law.—

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If two Joint Debtors are taken in Execution a voluntary release of one from custody by the Pltff. or Creditor, is a release of both. The consequence then is, that the one released nor his Co-Debtor can be taken in Execution.—

Salk 574. Croke 557. 1 Ford 98. 6 T.R. 525

But under the Law Merchant, the holder of a Bill or promissory note, after having taken one Indorser in Exn & released him without actual satisfaction may sue another & take him in Execution, & if he releases him without actual satisfaction, he may sue a 3d and so on till he has tried the whole. But in this case it is to be observed that the Indorsers are not Joint Debtors, for they are distinct & independent Indorsers, each one is a new drawer of the Bill. And Mr Gould supposes if they were Joint Debtors, that the Law Merchant would give way to the Com. Law.— A holder has it not in his power to give title to a party on the bill first liable, & afterwards to proceed against another.— But see the rule laid down, Contra 1 Bos & Pull 655 It was formerly decided that if a sole Deft. imprisoned on Execution died in prison, the debt was forever extinguished, & the reason given was that the Pltff. having elected his highest remedy ought to abide the consequence.—

2 W Bl 1235 Cro. R. 1235 Chitty 124. 155. 4 Term 825. 2 Show 48 2 Show 481 Ita 3 Esp R. 47. & 49 1 Bos & Pull. 652. 2 do 61. 3 Esp R. 50. Mah. 52. Croke 850 Croke J. 136. 143 3 Com 310

But this rule was never agreeable to the principles of the Com. Law for it is in no wise analogous to a person having two remedies given him where by electing one, he waives the other.— The imprisonment of the body is deemed a mere pledge for the security of the debt, if therefore the prisoner die, without the fault of the Creditor, the latter can never be

5 Co 86. Croke 850 Croke J. 143

considered as having waved his remedy, for the loss of the pledge does not work an extinguishment of the debt which it was intended to secure. —

But if one of two Joint-Debtors die in prison on Exr. it does not work an extinguishment of the debt as to the other, but only as to him who died. —

5 Co. 86.
Cro. J. 143.
Cro. El. 850.

But by the Statute 21 Jac 1st it is declared, explained & enacted, that where a sole debtor dies in prison, Exr. may be sued out against the Estate, as tho the Debtor had never been imprisoned. —

2 Ba. 354.

A Bond given by the prisoner to the Sheriff, conditioned that he will abide a true prisoner, until he has paid the Debt, fees & expences, is void, as being against the Statute 23 Hen 6th. — The Supr. Court of this State seem formerly to have adopted the idea, that such a bond is void only as to the board. Mr Gould thinks it void as to the whole, for it is an established principle that if part of one entire Contract is void, it renders the whole so. —

1 Root. 158.
Doug. 128.
2 Esp. R. 575
1 Bos. & Pull. 24

The oath of a poor Debtor only operates to discharge his body from custody; for if he has any Estate, or afterwards acquires any, it is liable to be taken for this demand. —

1 Root. 185.
do. 117.

Mr G. thinks an store may be broken open in order to arrest provided it is not a part of the dwelling house, & thinks that the fact of a Clerk's sleeping in the store would make

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Inns and Innkeepers.

Palm. 374. 1 Rol. pl 84. Croz. 549.

At Com. Law any person may exercise the ~~office~~ employment of an Inn Keeper unless it is inconvenient to the public; for they are established & act without licence. — And he who thus assumes the Character of an Inn Keeper, becomes liable to the duties attached to it. —

But Common Inns merely from their number

3 Bac. 179. 4 Bl. 168. 2 Hawk 174. 2 Hale P. C. 174.

become Common Nuisances, at Com. Law; & the Keeper may be indicted for a common nuisance in such case at Com. Law. — It is to be observed that when the number is to great, those Inns ~~which~~ Keepers whose Inns have stood the greatest length of time, are not to be indicted, but the new ones last established; i.e. those Inn Keepers who set up after there were a sufficient number; & hence become a Nuisance. — The way that the public suffers an injury in these cases is, that where the number is so great the business of each is of course small, & no one considers it an object sufficient to make proper arrangements & accommodations for Travellers.

At Com. Inn also by being disorderly may become a common nuisance; & in this case the Keeper may be indicted at Com. Law as for a common nuisance. — As where the Inn harbors Thieves Robbers, Drunkards &c.

1 Hawk. 198. 225. 4 Bl. 168.

But in Connecticut, no Inn can be lawfully established unless licenced by Law. This licence is obtained for one year only, from the County Court in the County where the Inn is set up; which licence issues upon the

Stat. 408.

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recommendation of the civil authority, selectmen, Constables, & Grand Jurors of the Town.

No person unless he is thus licenced can keep an Inn in Connecticut. And if the Inns thus established become too numerous, the Keeper cannot be indicted as at Com. Law, for the Court has sanctioned it.—

If an individual establishes an Inn without licence,
Stat. 408, 9, 412. & entertains people, he is subject to a penalty of ten Dollars for the first offence. 20 Dollars for the 2d & so on doubling for every offence, till the offender cease violating the Law.

For disobedience to the Law regulating Inns
Stat. 411, 12 & Inn Keepers, the Keepers licence may be suspended by the Civil authority & select men till the next County Court, & the Court may remove the suspension or continue it, till the expiration of the year for which such such licence is granted.—

Mr. Gould concludes that this provision cannot oust the Com. Law indictment for a disorderly Inn; he views the provision made by this Statute as affording a cumulative remedy.—

The Duties of Inn Keepers.

Their duties extend generally, only to the entertaining of Travellers,
9 Co. 87. & keeping their Goods & effects.

The Inn Keeper is not made the keeper of the person of his guest, but merely of his goods.

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If an Inn keeper refuse to entertain an Individual
4 Bl. 168. without offering sufficient reason, or being tendered a rea-
3 Bar. 181. sonable compensation, he is liable not only to the person
1 Wash 225 injured, but to a public prosecution.

If the Inn is already full, or the keepers family sick; it is a sufficient excuse for refusing to receive a Traveller — The cause must always be a substantial or reasonable one. — What amounts to such a cause must be determined by the Juries.

If (as before remarked) the keepers duty does not extend
8 Co. 32. to the person of his guest, then he is not liable for assaults which he may receive from 3d persons while at the Inn.

If the Host or his servant sell to the Guest unwholesome food or liquors, he is liable to an action on the Case;
1 Roll. ab. 95. & the reason is that the Traveller is under the necessity of trusting to the fidelity & honesty of the keeper in these particulars, a violation of this trust therefore ought in justice to subject them.

The principal rules as to the liability of an Inn keeper, have been noticed under "Bailment" a few additional rules therefore will close this branch of the subject.

The Inn keeper is not discharged from his gen-
Cro El. 627. eral liability for the goods of his guest, either by absence, sickness, or insanity; & the reason assigned is that he ought, & it is his duty to provide against contingencies of this nature, inasmuch as they are infirmities incident to

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human nature. —

1 Rol ab. 2. — An Inn Keeper is not chang-
2 Bac. 182. able in the character of an Inn Keeper, for his privi-
lege takes place in consequence of the general custom.

If the Host refuses to receive the guest upon suf-
Dy 158. ficient cause, & the latter persists in tarrying at the
Inn, the Host is not liable for any loss which he may
3 Bac 183. sustain of his goods &c & the reason is that it is the
fault of the guest in continuing. —

If the Host require the Guest to lock his
Dy. 266. apartment, or he will not be liable for loss of his goods;
Moor. 78. still in the event of a loss occasioned by the guest's neg-
158. lecting to comply with the request, it appears from the
3 Bac. 183. current of authorities, that the Inn Keeper is liable, —
for it is said that the host cannot discharge the
breach of his duty by such a request or declaration. —

At any rate it is clear that the delivery of the key
Sho. 33.a of an apartment to the guest does not discharge the Inn-
3 Bac 183. Keeper, tho' the goods were lost in consequence of the doors
being left open by the guest.

An Inn Keeper like a Com-
mon Carrier is liable for the goods of his guest when lost,
altho' he knows not their kind or value; yet if he demands
a knowledge of the articles & is deceived as to their kind &
value, Mr Gould thinks he ought not to be liable at all,
or at most to the amount of the property represented to him
by the guest. Mr Gould has given his opinion at large on-

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der the "Bailment" Vide that title for the solution of this
5 Term 273. question. See however 8 Co. 33a Moor. 158. 3 Bac. 183.

The liability of Inn Keepers for the goods of their guests, obtains only in favor of Travellers, & such as board at their Inns at the price paid by Travellers. It would not therefore extend to a neighbour, or to such as board there at the price of board at private lodgings; for in this case they dont receive them in the character of Inn Keepers, but merely as private houses.—

Inn-Keeper & guest are relative terms; but Inn-Keeper & boarder are not.—

An Inn Keeper is not chargable in the owners absence for the loss of goods, for the keeping of which he re-
5 Term 273. Moor. 877 ceives no reward. By the owners absence is here meant, 1 Rol. ab. 3. such an absence as that he is not considered as a Guest. 338.
Cro. J. 188. In order that he should be received as a guest however, it is not necessary that he should be considered as infra hos-
Noy. 126. pitium, for if his goods are infra hospitium, (by which is meant the curtelage) it is sufficient.—

But for any goods for keeping of which he does receive a reward, he is liable in the event of a loss, or injury, tho' the owner has left the Inn for any length of time.— Therefore if one leave his horse or Cattle at an Inn, & go away for a month, say; here as the keeper has a reward for their keeping, he would be liable in case of a loss. But if the Traveller leave inanimate property, as his baggage (for the keeping of which the Inn-keeper receives no reward)

he would not be liable as Inn Keeper in case of a loss or injury. — tho he may make himself liable on a bailment, in which case he would be considered as a bailee of the 5th kind — & liable in that Character — see "Bailment."

Of the Inn Keeper's remedies against his Guests.

1 Rol. Ab. 86. Salk. 388. Carth. 150. Gilb. L. C. 527

The remedy of the Inn Keeper against his guests is two fold. 1 By action. 2 By retaining his person or property, till the price is paid. — He may retain his person for all expence that have accrued. — But his horse cannot be detained except for the expence of horse keeping — As a Taylor may retain a garment till the expence of making it is paid for him; yet he cannot hold it for a general balance. —

2 Rol. Rep. 438. 3 Bar. 185.

If however the Inn Keeper once abandon his possession, by permitting the guest or his Horse to leave his house or Barn he has, no longer a lien upon them, but must resort to his action. If however the Guest goes away with his Horse without the Inn Keeper's permission, the latter may retake him on fresh suit. — So of the person. —

Moore. 877 Hat. 556.

The Inn Keeper must not however use the horse, which he detains, & if he does he is ipso facto guilty of a conversion. The Inn Keeper has the same remedy under our statute as at Com. Law, tho his action or

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the Case is in many cases abridged.

An Inn Keeper in Lond.t can maintain no action for liquors retailed out unless they are dealt out to Travellers or boarders, unless the action be brot. within two day (or 48 hours) from the delivery. This provision regards tipplers &c.—

3 Bar. 185 — 3 Burn. 1886. — 1 Wils. 305.

Where the person or Horse of a guest is retained, if a parol promise is made by a 3d person to pay the expences, provided the Inn Keeper will deliver up the possession, it is binding the Statute of Frauds & Perjuries notwithstanding. It is to be observed that it is not strictly to pay the debt of another, but merely to pay a certain sum for the giving up a security or pledge.—

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Bailment.

Bailment is a delivery of goods from one person to another on a condition expressed or implied that they shall be returned by the Bailee to the Bailor according to his directions when the purposes for which they were bailed are answered.

Jones 348. 1 Vern 268. 12 Mod 482. 6 Co El 622.

Thus if A. deliver goods to B to keep while A is absent, or if one deliver cloth to a Dyer to colour, it is a Bailment.

The person who delivered the goods is call^d the Bailor, & he to whom they are delivered is call^d the Bailee.

Jones. 35.

The authorities upon Bailment are very contradictory.

Every Bailment vests a qualified property in the Bailee of the thing Bailed.

Jones. 112. 1 Bau. 240. Yelv 172.

A pawnee as distinguished from other kinds of Bailees, is said by Coke to have a property in the goods.

4 Co. 83 b. Co Lit. 87. 3 Ath. 46.

But there is no such distinction. A Pawnee has it is true from the nature of the Bailment, a stronger interest than some of the other kinds of ~~the~~ Bailees, but all kinds of Bailees have a certain kind of property in the goods.

7 Term 392, 8. 3 Ath. 46. Atha. 605.

From the Bailees obligation to restore the goods or things bailed, it follows that the Bailee must keep it according to the terms of the contract, & be responsible to the Bailor if ~~they~~ he lost or damaged; still however as the bounds of justice would be transgressed, if the Bailee in all cases were made liable at all events, it is a general rule that he is not liable if the

Jones. 8. 1 Bau. 236.

loss or damage happen without any fault of his.—

But to determine when he is in fault, the nature of the Bailment & quality of the thing bailed, as well as his own conduct are
Jones. 8. to be considered, for different kinds of Bailment require different degrees of care and diligence. To ascertain the different degrees of diligence requisite in every case, constitutes the principal difficulty of this Title.

In considering this subject I shall compare the authorities, & dicta in the books, with the principles of the law as laid down by Jones.

Of the degrees of diligence required of Bailiffs in different cases.—

The most general rule is that the Bailee is bound
Jones. 8. to keep the goods with a degree of care proportionate to the nature of the Bailment.—

In some cases the degree will be greater & in some less than ordinary diligence, for the degrees of care are various.

In order to understand this rule we must define the different degrees of care & neglect.—

Ordinary diligence is that which ordinary or ra-
Jones. 9.10 tional men use generally in conducting their own affairs, or in other words that which every rational man of common prudence uses in the management of his own concerns.—

The degrees of difference on both sides of the standard or measure,
Jones. 10. are not distinguished by any peculiar denominations. That

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exceeds is called more, what falls short is called less than ordinary diligence.

To every degree of care or diligence there is a correspondingdegree of default or neglect: thus the omission of ordinary care or diligence, that is, such as every rational man of common sense & prudence takes of his own affairs, is called ordinary neglect.

Jones. 11. 13. 31.

The omission of that care which every attentive & diligent man uses, is less than ordinary neglect; this is called slight neglect.—

Jones 13. — 31.

The omission of that care which every negligent & careless men take of their own affairs is greater than ordinary neglect, & is commonly called gross neglect.—

Jones 13. 30.

... last degree. Dig. gross neglect, is generally regarded as evidence of fraud in the Bailee, but not however in all cases, as where the Bailee suffers his own property to be lost by the same negligence by which the Bailors is lost.—

D Ray. 915. Jones 13. 30. 64. 65.

In order to apply the general rule first laid down under this head to particular cases, it is necessary to observe the following rules. 3 in number.—

I. If the Bailment be for the benefit of the bailor only, nothing more than good faith is required of the Bailee, he is liable for gross neglect only, that is for a violation of good faith.— Jones. 100.—

1 Bac. 6. 247. D Ray. 915. Jones 13. 16. 21. 32. 51. 55. 64. 65.

There is a dictum in Coke. Rep. contrary to this rule. It is not law. 4 Co. 83 b.

There is however an exception contrary to this rule. "When the Bailee by a special agreement makes a

D Ray. 910. Jones. 22, 8

himself liable for less than ordinary neglect," if perhaps in some other cases.—

Jones. 6. 12, 6.

The Books generally agree with this rule, when taken with its exceptions.—

II. When the Bailee only is benefited, he is liable for slight neglect, that is bound to more than ordinary diligence.— And here the same reason operates as in the former rule. Viz. that it would be hard for the person who does the gratuitous act that he should incur the risque & not be indemnified in doing the act in case of loss or damage, unless the other has been guilty of gross or ordinary neglect. He who receives the benefit ought to bear the burden.—

Jones. 15. 16. 23. 33. 89. 90. 91.

III. When the Bailment is a benefit to both parties, the obligation hangs in equal balance, therefore the Bailee is bound to use ordinary care & diligence only, & is liable for ordinary neglect.—

Jones. 14. 22 23. 32. 101. 105. Gilb. L. E. 419.

The last three general rules are derived from the Roman Law.—

Jones 33.

So far as the mere private justness of the case is to govern, these rules will hold in all cases. But there are certain rules that are governed by general policy, & in which these rules do not obtain.—

Of the different kinds of Bailment.

In the division of Bailment, several eminent Lawyers have differed. According to some of the Books there are six kinds. Sir Wm Jones divides it into five. Mr Reeve

Bailment.

into four: But it is thought proper to pursue the first division. —

I. The first kind of Bailment is called Depositum, and is a delivery of goods to be kept by the Bailee without reward from the Bailor. The person to whom the goods are delivered is called the Depositary, or vulgarly the naked the naked Bailee. —

D Ray. 912. Jones. 50. 1. B. N. P. 72. 1 P. C. 247. 1 Bac. 243. Esp. 618.

II. Bailment of the second kind is called Commodatum & is a gratuitous loan of goods, which are usually to be used by the Bailee, & which are to be specifically restored by the Bailee to the Bailor. The Bailor in this case is called the lendor, & the Bailee the borrower. —

D Ray. 913 915. Jones. 50. 1. B. N. P. 72. 1 Pow. C. 247 1 Bac. 243 Esp. 618.

This kind of Bailment differs from mutuum, which is a loan for consumption, & to be paid in property of the same kind, but not in the same property; as in the case of money, wine &c, in these cases the absolute property is transferred to the Borrower, who in case of a loss must bear it at all events. —

Jones 89. 90. 1 Bac. 141. D. & St. 129.

III. Bailment of the third kind is called in Law Latin, is called Locatio, or locatio conductio rei. & is a delivery of goods into the hands of the Bailee to be used by him for hire. The Lender is called Locator & the hirer Conductor. —

D Ray. 913. Jones. 50. 119. 1 Pow. C. 251. B. N. P. 72 1 Bac 343. 243.

Jones makes this a sub division of his fifth kind which he calls Laratum. —

Jones. 50. 119.

IV. Bailment of the fourth kind is a security, or a debt from the Bailor to the Bailee. This is called a Pawn or Pledge, & in Latin Vadium, vel Pignori acceptum. The Bailor is usually called the

D Ray. 913. Jones. 50. 124. 1 Bac 237. 243. B. N. P. 72

Bailment.

Yel. 178. Pawnor, & the Bailee the Pawnee. — Co Lit. 205. 4 Com. 258.
Esp. 624.

V. — The fifth kind of Bailment is a delivery of goods to be carried or some other act done about them for a reward. It is called when the goods are to be carried *Locatio operis mercium vehendarum*. When some other act is to be done about them it is called *locatio operis faciendi*. —

This kind includes a delivery of
2 Ray. 913. goods to a common carrier, or to any one who receives them, in
917. 918. the exercise of a public employment, & to a private ~~person~~
1 Bos. 253. carrier or other person. A delivery ~~of~~ to a private pe in-
3 Mb. 72. 73. cludes one of a private professional character, as to a tay-
1 Bar. 240. 244. lor or other mechanic, & so to Bailiffs Factors &c. —

VI. Bailment of the sixth kind is a delivery of goods as in
2 Ray. 913. the fifth case, to be carried or for some other act to be done a-
1 Bos. 257 bout them; but the carrying or other act to be done is gratu-
Bac. Ab. 73. itous. This kind is called *mandatum* or *mandate*, &
6 Co. 224. Jones 374. the Bailee mandatary. —
Gilb. L. E. 417.

We shall now consider the different kinds of Bailment in their order. —

I. Naked Bailment or Deposit.

A naked Bailment or Deposit is a naked bailment to be kept by the Bailee for the Bailor gratuitously. —

Vin. 1099. In this case the Bailee or depositary is bound only to good
mes. 32. faith, & liable at most only for gross neglect. 2 Ray. 909. 913.
6 Co. 65. 100.
108. 1 Bos. 247.

Holt says "ordinary care" will excuse the depositary
1 Bos. 247 which seems to imply that less than "ordinary care" will not;
2 Ray. 913.

but he evidently uses the words "ordinary care" without
D Ray. 913. any definite meaning. —

But he is not always liable for gross neg-
Jones. 65, 6 lect. Indeed generally speaking he is not liable at all, for
D Ray. 655.
911 & 915 neglect as such, considered as such in the abstract, but
Stra. 1099 for fraud only. —

Burr. 2300.
1 Bos & P. 243.
or 248. If even gross neglect does not furnish evidence
of fraud, as where he treats the deposit as his own goods he
is not liable; thus if the depositary be a careless ~~man~~ idle
drunken fellow, & leaves his doors open by which means the
deposit together with his own goods are ~~taken~~ stolen, he is
not liable. —

There is however an exception to this rule where
Jones. 66.
D Ray. 655, the depositary by special agreement makes himself re-
911. 913.
3 Reeves Hist. of Eng. Law 245 & 391. sponsible for less than ordinary neglect, he may thus
make himself liable to any extent. —

There is perhaps a principle another exception "when
the deposit is in consequence of the Bailees officiousness in
offering to keep the goods, tho' the acceptance is general, for the
Jones. 67. avenue is prevented by this officiousness, from intrusting them
to a person of known integrity & vigilence". It is therefore
the opinion of Jones that he ought to be liable, for ordinary
negligence. But this rule is too refined to admit of applica-
tion. —

Cobit 89.
4 Co. 83.
Croke 815. The old authorities are contrary to the general rule first
laid down under this head. —
Jones. 68. ..... The doctrine advocated in Southcotes Case, in substance

is this, that every acceptance to keep implies an agreement that the goods shall be kept safely; which would subject the Bailee for less than ordinary neglect.—

2 Bac. 236. 241. Bro C. 815. 4 Co 83. b. 1 Com. 103 1 Rol. 338. 2 Ld. 1105. 911, 913, 1 Jones 5-9. Sta. 1099. Com. 133. 135. B & P. 72.

Thus the doctrine is repugnant to the general rule by which we are to discover the liability of Bailees, & is clearly & expressly overruled by a weight of authorities. Indeed the doctrine here is advanced obiter, & the decision is otherwise clearly reconcilable with the general rule.—

Some have taken the distinction between a special agreement to keep safely where there is a valuable consideration, & where there is none, that is, in the former case such bailee would be bound by his agreement, & that in the latter he would not, for it would be a nudum pactum.—

1 Bac. 241

But this valuable consideration would altogether alter the nature of the Bailment of the fifth kind. So that this dictum if it were well founded would not affect the Law on this subject as to depositaries.—

*Jones. 135. 2 Roy. 919. Dr. & Ed. 129. 12 Mod. 487. 3 Reeves hist. B.S. 245. 246. 394.

But it is not founded on principle, for the delivery of the goods is a sufficient consideration for the spiral undertaking.

The authorities above belong to this rule.

It has been holden that where goods have been left with a depositary in a locked chest of which the Bailor takes the key, the Bailee is liable for the Chest only, and not for the goods, for they, it is said are not intrusted with the depositary

1 Bac. 237. 2 Ath. 47. 4 Co 83. b. 60 Lit. 37 87.

Coll. is opposed to this decision be-

cause the Bailee has as little power of over the goods as to any benefit when out of the Chest as when in, & as
D Ray. 914. much power to defend them in the one case as the other.—

It is remarkable that neither Holt nor Coke take
Jones 51, 2. 54. into consideration, the circumstance of the Bailees being
7 Term. 705. ignorant of the contents of the Chest or not.— But this
D Ray. 910. Go. 62, 3. 75. circumstance Mr. Gould thinks ought to be the criterion.

But tho a depositary may subject himself by special acceptance to keep safely.— Yet this will not amount to an assurance at all events even if reduced to writing— as where the loss happens by the act of God.— II

It is also laid down that a special acceptance to keep
Jones. 62, 3. safely will excuse him from losses happening by the acts
1 Raw. 248. D Ray 915. of wrong-doers; but this rule is laid down too extensively,
Hob. 34. Br. of St. 130 the meaning of it is evidently this; that he is excused, from such acts of violence as he cannot resist. Robbery, generally speaking does excuse the Depositary.

A special agreement to keep safely amounts to this; that the Bailee will use all ordinary care & diligence in keeping the goods safely, for if his liability were to extend any further, he would be liable even in cases of robbery or inevitable accident.—

He is not excused where the loss was occasioned by
4 Co. 83.— theft.—

If the depositary refuse to deliver the goods on demand without lawful excuse, it is evidence of conversion, for

which he is liable in Trover.—

He is also liable in detinue & in assumpsit on the promise express or implied, but Trover is the most extensive remedial action, & is best adapted to this case.

1 Com. 22 a
1 Rol. 128.
Cro Eli. 781.

Jones says that if the depositary is at any expence in keeping the goods bailed, he may use them as an indemnity for the expence at which he has been in keeping, as if it be a horse or cow, he may ride the horse moderately, & milk the cow regularly, by way of the compensation for the charge.—

Jones. 114.

II. Commodatum.—

This kind of bailment is a gratuitous loan of goods to be used by the Bailee, & to be specifically returned.—

Jones. 56. 89.
1 Ray. 913.
915.

Here the benefit being to the Bailee only, he is bound to more than ordinary care, & is liable for slight neglect, or as it is sometimes said for the least neglect.—

Jones. 91.
B. N. P. 92.
1 Bac. 224.
10 Rev. 249.

Thus if a horse be borrowed by the Bailee, & his servant puts it into his stable not locked, & the horse is stolen he is liable. But it would have been otherwise had the stable been locked.

Rev. 256.
1 Ray. 164 &c.

According to Jones the Borrower is liable in case of mere theft, unless he can prove extraordinary care on his part.—

Jones. 61. note. 92

A Borrower is not liable for such a loss by such force as he cannot resist.— Therefore generally speaking in this case is not liable for a loss by robbery.

1 Ray. 916.
1 Rev. 251.
Jones. 61. note.

2 Roy. 916. 1 Bar. 251. there being no guard against open violence. — Jones. 92.

But a borrower is liable even for robbery if he exposes himself to it, by his own rashness, as if he should leave the high road & pass thro' a haunt of robbers, especially in the night season. —

So a Bailee of this second kind is not liable

Jones 95. 6. 2 Roy 915 1 Bar 249. 250. generally for any of the accidents called inevitable, such as lightning tempests &c. But he may make himself liable for losses thus occasioned by a previous breach of trust. — 1 Bar. 247. as if he borrows a horse for one journey, & goes another or detains him for a longer time than that for which he is hired — here he is liable for all accidents, as he would be for Robbery.

This rule applies to all kinds of Bailment. 1 Bar. 253. 2 Roy. 919. 1 Bar 237. 238. bro. f. 244. —

So he may be made liable for those accidents occasioned by his own rashness. —

Jones 95.

III. Locatio et Conductio.

2 Roy. 913. Esp. 625. Gill & J. 489. This kind kind of Bailment is a delivery of goods to be used by the Bailee for hire. As a horse to ride &c.

By this contract the Bailee or hirer gains a transient qualified property in the thing bailed, & the Bailor an absolute right to the stipend or price. —

Jones. 14. — 120. Hence the Bailment being reciprocally beneficial, the Bailee is liable according to Jones for no less than

ordinary neglect, being bound only to ordinary diligence.—

But it is said by Holt that he is bound to the
2 Ray. 916. utmost diligence; if so, he is liable for slight neglect, and then the liability of a hirer is the same as that of a borrower, who is a bailee of the second class.—

1 Pow. 251. This doctrine of Holt is the foundation and only support
B. N. P. 72. to the rule as laid down by Powell & Bullen.

But first, Holt's proposition is only a dictum, besides
2 Ray. 916. Holt himself & Powell after him, do make a difference between
1 Pow. 231. the hirer & the borrower, as to their liability they lay down the rule generally that the hirer is excused in case of theft, but there is no such rule thus generally expressed in favor of the borrower in the same situation. In the case of the borrower it is said that he is excused from such a force as he cannot resist, here the idea of the least neglect is excluded.—

Again it is said by Justice Powell that if the hirer
2 Ray. 915. be robbed without any fault in himself, he is not liable; but
1087. no rule is proposed as favorable to the borrower. Indeed Holt says the Borrower is liable for the least neglect because he has the use of the things bailed.—

2d Holt relies for his authority solely on a quotation from
2 Ray. 915. Brauton which does not warrant the conclusion.— So in later
1087. superlatives are often used when the quality is not expressed
Jones 121. intentionally, in the superlative.

There is then no decision, nor clear authority requiring more than ordinary care & diligence in a hirer; & principle seems

to require no more, since the Bailment is beneficial to both parties.

The thing hired is to be kept with ordinary care.
Jones 126. & hence the hirer is excused in case of robbery unless occasioned by his impudence or want of ordinary care. But when a house is hired, the Hirer is liable by reason of the stables door's being open. —

IV. Pawn or Pledge. —

Jones. 50. 104. 2 Roy. 913. 1 Bac. 237. Esp. 621. 6. Lit. 205.

A Pawn or Pledge is called in Latin, vadium, or pignori acceptum, & is a delivery of goods as a security for a debt due from the Bailor to the Bailee. — 4 Com. 258.

If one deliver goods to another under an absolute sale, but it appears from another instrument that the delivery
1 Ch. Ca. 114. was to secure a debt, & it is agreed in the latter that the vendee may sell the goods when he pleases, & also that the vendor be subject to the ~~sa~~ vendee's right to sell, may redeem, the goods are a pledge. —

This contract being a benefit
Jones 105. 2 Roy 917. Bac. 252. Salk 522. 4 Com. 258.
to both parties, the pawnee by securing the debt, & the Pawnor by procuring him a credit or delay of payment. — The Pawnee is bound on principle to only to ordinary care, & for no less than ordinary neglect. — This rule is fully established in English Books. — In 2 Raymond ~~and~~ it is said expressly that the diligence by which is meant ordinary care expunges the pawnee. —

It has been holden that the Pawnee is bound to keep the goods pawned, as he keeps his own property, because he has a property in the goods. —

4 Co. 53. Co Lit 89. Jones. 105.

So has the Bailee a property in the thing bailed. —

Jones. 112.

This doctrine in Coke would subject a pawnee for gross neglect only; or not even for that as the case may be, but this is not only contrary to the general principle, but to the weight of authorities. —

A pawnee is excused according to the general rule in cases of robbery unless it was caused by his own neglect or fault. —

It is holden by Coke that if a Pawn be stolen, the pawnee is not liable, because he is to keep it only as his own ~~property~~ goods, having a property in it. — Gelv. 178. or 3. —

1 Rep. 83. Co Lit 89. 1 Bro 237. Palm 551. Paw. 23 Cro 524.

But Jones holds unconditionally, that he is liable in case of mere theft, because a Bailee cannot be considered as using ordinary ~~neglect~~ diligence who suffers goods to be lost by stealth. —

Jones 61. 106, 7. 109. 115. Salk 522.

Quere as to the case of theft; for it is to apprehend a question of fact, in every case of theft, whether ordinary care was used or not; & the general doctrine of Holt seems to leave it on this footing. —

Jones 61. 92. 2 Ray 917. Salk. 522. 4 Com 258. or 3. 1 Bro 252 2 Vent. 122, 1. —

The pawnee gains, like other Bailees a qualified property in thing bailed. — Salk 522, 3: 268. —

2 Ray 916. Jon. 112. 3 Atk. 46.

This interest is determined by the tender of the money due,

4 Com 258. or 2 253. 4 Co. 83 b. 1 Bac 837. 4 Co. 79 Croft 244. 2 Term 27. B.N.P. 72. — and the whole interest vests in the pawnor, tender & refusal being in this case equivalent to payment.

Therefore after a payment or tender, & demand of the Pawn, the pawnee retains it. He is a wrongdoer, & is liable for any loss or injury at all events, even for inevitable accidents. —

Jon. 111. 112. Esp. 625. 1 Pow. 243. 4 Co. 83 b. Salk. 523.

This is one of the exceptions to the general rule of the Pawnee's liability. —

4 Com 258.

So if the refusal be by the pawnee's servant, acting regularly in his master's business. So also the pawnor may in this case if he elect, maintain assumpsit on the implied promise to redeliver. —

Jones. 126. 1 Com 220. Salk. 147. B.N.P. 72

On refusal to redeliver after payment or tender, the Pawnor may maintain trover. — This ~~last~~ rule ought to be placed before the preceeding one. — ~~B.N.P. 72~~

Jones. 111. Croft 244. 1 Bac 237. 1 Com 220. ~~Salk. 147.~~ 4: 258.

A refusal to redeliver on payment or tender, is an indictable offence at Com. Law, & this on the ground of policy. —

1 Com 258. Salk 379. 522. Comyn 277. 1 Bac 240: 2 Hawk. 210. —

It is said by Jones to be ~~laid down~~ down by Butler that on tender & refusal, the thing Pawned ceases to be a pledge & becomes a deposit. I do not find it laid down by Butler, nor can the proposition be true, for a depositary is liable for gross neglect only, but the Pawnee in this case is liable for a loss at all events. —

Jon. 111. B.N.P. 72

By tender & refusal the money it seems, becomes the property of the pawnee, for tender and refusal are equivalent

Cro. J. 244. Jones. 111. B.N.P. 72.

to payment so often refused at the Pawnor is liable for the money to keep for the Pawnee, & is liable for gross neglect only. —

1 Bac. 237. 2 Sum. 27.

In some cases the pawnee has a right to use the pledge & in others not. — But this right when it exists is said to be founded on the Pawnors consent expressly given or presumed. —

Jones 112 113.

This presumption of consent generally exists or not as the pledge is likely to be made better or worse or not at all affected. — Thus where ~~the~~ a hound is pledged the presumption exists, for by use he is confirmed in useful habits, so that the pledge is made better. —

So if it will not be injured by use as where jewels &c are pledged, the pawnors consent is presumed. But here the pawnee uses the things pledged at his peril. he will be liable even in cases of robbery, & I presume for inevitable accidents. —

4 Com 258. Salk. 522. 1 Bac 237. Jones 113. B. N. P. 72. Cobit 89. 2 Ray 917. 1 Rol. 339. 673.

So if the Pawnee be at expence in keeping the pledge he may use it, as where a horse or bow is pledged, ~~by~~ way of recompence. — The bow indeed is better for the use: is there a presumed consent in this case that is, is the rule founded upon it? The Pawnee in this case & in the first is not I suppose liable for robbery while the things are in use, and in the last case. ~~Viz. that of Jewels~~ The right in the last case, viz. that of Jewels &c arises from a presumption founded on indulgence. In the first & present case from a principle of duty & justice.

Jones 114. 4 Com 258. Salk. 522. B. N. P. 72 2 Ray 916. Esp. 625.

According to the Roman Law, the pawnor was obli-
Jones 116. ged to account for the benefit of the use, but not at
Com. Law.

So too according to Jones a Depositary may use
Jones 114. 115. the thing Bailed when the keeping is an expense to him
for he ought not to be injured or benefited.

But if the Bailee will be worse for using, if the keeping is
Jones. 113. not expensive, the pawnee may not use it; as where
4 Com. 258. clothes are pawned. Here the presumed consent does not
2 Ray. 917. 913. exist. B. N. P. 72.

If he does use them, Trover in the first
5 Bac. 157. 1 Com. 221. instance I conclude lies; for unlawful use is a conversion.
5 Bac. 157. 266. The Law as to pawns, is said by Holt to apply to goods
2 Ray. 917. 1 Bac. 252 found.

According to Powell the Law implies a contract, by
1 Bac. 252. the finder to use ordinary diligence.

But in some authorities it is said that he is not bound
Cro. Eli. 219. Esp. 599. 1 Bac. 243. 1 Com. 223. to keep it safely, nor liable for negligent keeping. — 2 Bulst. 21.

On this point the finder does not seem to be liable
2 Ray. 909. on principle for any thing less than gross neglect; because the
sole benefit is to the ~~bailee~~ owner, unless the owner is com-
pellable to pay the finder for his trouble. But there is a great
difference between finding & a deposit. In the latter case the
owner has it optional to deliver or not, & selects his depos-
itary. In the former it is otherwise; Indeed, finding is not
a strict Bailment. The finder ought clearly to use ordi-
nary care, or not take the thing, & here the opinion of

Bailment.

Powell seems to be correct. —

Indeed in the case of Co. Litt. the decision seems to be made by that Trover would not lie, if it was not right, for Trover is only for misfeasance or actual wrong, if not negligence. Bull. 28 27: 8 Co. 146. 1 Rol. 62.

Hob. 251. Co. Lit. 218. Esp. 590. Salk. 143. 5 Bur. 2597.

A finder of goods has no lien upon them at Com. Law, for his trouble &c, but is liable in Trover on ~~neglect~~ refusal to deliver them up tho' his expences be not tendered. —

2 H. Bl. 254 Esp. 585 Str. 651.

The case of salvage is different — 2 H. Bl. 254. 2 Ray. 393. —

A question has been stated respecting the finding of goods which has never been decided by the English Courts. If A finds B's goods & C claims them, & sues A for refusing to deliver the goods & recovers. B then sues A & proves his property, can he recover? It is believed that on principle he cannot. For it is a rule of Law that where a man is compelled to pay a sum of money by process of Law to a wrong person, he cannot be compelled to pay it over again, tho' if he had paid it voluntarily he might

6 Mod. Rep. 370. 1 Bl. 668. 682. 2 d. 408.

If the Pawnee having tendered & recovered in Trover, yet the Pawnee may have his action to recover what is due but he must first make a demand. —

1 Bur. 238.

If perishable goods be pledged & decay, yet the Pawnee may recover his money, for the debt continues, the pledge being only a security for the debt & not for the payment. —

So too while the Pledge remains unredeemed in the

1 Bur. 238. Rol. 179. Co. Lit. 209. 7 Com. 258. Salk. 523.

4 Com R 58. Sta 919. Esp 86. 1 Lev 116. 4 Co. 179. Pawnee's hands, he may sue for his debt, & recover unless there was an agreement to the contrary, that is, that he should rely solely on the pledge.—

1 Bac 238. 1 H Bl 104 3 Atk 395. 1 Vern 691. 698. 4 Com 258. Co Lit. 205. If the money be paid by the day, the Bailor has a right to the property pledged, but if not the property is absolute in the Pawnee. But the Pawnor has a right of redemption in Equity; even tho the agreement is that the property if not redeemed by the day should vest absolutely & be sold.—

Jones 106, 7. 2 Ray 919. Bum 1594. If the pawn be lost tho' the previous fault, that is, tho' the omission of ordinary care of the pawnee, the debt it seems was extinguished.— But this does not seem to be a very reasonable rule, since the Pawnee is liable to the Pawnor for the value of the thing pawned.— It is said however that if the Pawnee use diligence in keeping the thing pawned, if it is lost it shall not be an extinguishment of the debt.—

Sta. 1178. 5 Term 604. 1 H Bl 362. 4 Com 227. Cro J 247. A Factor cannot pawn the goods of his principal, so as to give the pawnee any lien as against the principal. He cannot thus transfer the right which he himself has, nor create one even to the same amount, for a lien is a personal right and not transferable.—

But on tender to the factor of what is due him, I now lies against the Pawnee. There must I presume be a demand on the pawnee, tho' this is not mentioned.—

Co Lit. 205. After the day of payment the pawnee may doubtless sell the property, it being absolutely in him at law

Bailment.

But according to Mr Reeve the pawnor may in equity & perhaps at law recover the surplus, if the thing was sold for more than it was pawned for. —

4 Com. 238. 1 Bulls 29. 31 Owen 124. 1 Ves 350 1 Bac 239. Cro J. 244. According to Comyns the pawnor may before the day of payment assign the pledge. But a case in Ld Raymond seems to incline the other way. & Justice Buller says a lien is a personal trust, & cannot be transferred. — Yel. 178: 5 Com 606.

1 Bac. 238. 1 Ves. 359. It is also laid down that it cannot be aliened, which plainly implies that the pawnee cannot assign the pawn, since it was never supposed that he could sell.

1 Bac. 238. 2 Bac. 376. Co Lit. 8. 12 Co. 12 Cro. 556. And it is a rule that a pledge cannot be forfeited by the pawnee, but a man is capable of forfeiting what he can convey in his own right

A pawn may also be considered in the nature of a personal trust. The owner may be willing to entrust his goods to one & not to another. If the pawnee might assign at pleasure, the pawnor would be in danger of a loss, for the assignee might be a knave or beggar. This is different from the case of land being mortgaged which cannot be run away with. —

1 Bac. 239. 4 Com. 258. 1 Owen 124. Again a pawn cannot be taken in execution, for the pawnee's debt, neither can it be attached for his debt. —

This last authority is the same which Comyns cites to the point that a pawn is assignable. The principle in this case is the same as in the last. —

1 Vern. 691. 698. The case in 1 Vernon does

not militate against our reasoning, for the Bill was
Esp. 583 533 but in that case after the ~~assignors~~ Plaintiff's right was forfeited
Re. 6 L. 419. 420. at Law.

On the whole it may fairly be inferred that a pledge cannot be assigned.

The Pawnor may forfeit his right in the
1 Bac. 233 1 Bulst. 29. pledge, by delay for but the thing cannot have it without
7 Com. 259. Yel. 179. paying the sum due to the pawnee. —

Anciently it was deemed essential to a pawn that it should be delivered at the time the money was
1 Bac. 238 lent or the debt accrued. Therefore it was considered
Yel. 164. 1 Vez. 35 not as a pledge giving a special property in the holder, but merely as a license to excuse his pass. — The law is now otherwise. —

Therefore if A. deliver goods to B. as a secu-
1 Bac. 139. 239. 238. rity for a debt already due from A to C, C becomes
Yel. 164. pawnee with a qualified property, so that A. cannot countermand the delivery; tho a contrary opinion formerly prevailed. —

It seems that the rule in the case supposed is founded on an agreement between A, B, & C that the delivery
B. N. P. 35. 1 Bulst. 68. Esp. 576. should be to B, unless he were C's agent. —

But if A deliver goods to B. as a naked donation to C.
1 Bac. 239 5 do. 260. the delivery it seems, may be revoked before C obtains
Esp. 577 the actual possession, for the delivery was without com-
Str. 955. pensation.

And it is holden that a parol gift without some

act of delivery, will not transfer any interest so that an action will lie against the donee after demand; I suppose if he take the gift. —

It was formerly doubted if no day of payment was fixed, whether payment or tender would revest the property, unless it were made during the joint lives of the parties. But it was holden that the pawnor might redeem at any time during his own life, even after the pawnee's death. —

1 Bac. 239.
4 Com. 258.
2 Co. 79.
Cro J. 244.
Yel. 179.

And if the Pawnee before his death deliver the goods pledged to John Stiles, without consideration, tender is to be to the pawnee's executor, if not to John Stiles. If after such tender John Stiles refuse to redeliver he is liable in Trover. —

1 Bac. 238.
Cro J. 244.
Yel. 178.

But if in the last case the Pawnee being the pawnor, had delivered to John Stiles for a consideration, the question to whom tender must be made is the same as whether pawns are assignable before the day of payment; according to some authorities it must be made to the Pawnors Ex^r & according to others not. —

Yel. 178.
4 Com. 258
1 Bulst. 29.

But there being no time fixed in which the pawn must be redeemed, that is, tender must be made if at all during the life of the pawnee, & his Ex^rs cannot do it, for the condition is personal as to the pawnee.

1 Bac. 239.
1 Bulst. 29.
Cro J. 244.
Yel. 178.
4 Com. 258

It is questionable whether this rule would be adopted here. There ought to be at Law some limitation, of the

the pawnee may sue for his debt during his life, yet the pawnor may be worth nothing. —

It is supposed by some that Equity would relieve, unless it were clearly shewn to have been the interest of the pawnee, that redemption should be lost in case of the pawnor's death. This seems to be reasonable for when a day is fixed & passed there is an equity of redemption

1 Bac. 239 note
Co Lit 205
1 Ver. 691.
698.

If a day be fixed for payment, the pawnor's interest is not forfeited by his death; the Exr. may do it by paying or tendering, as the pawnor might do it if living. —

If the Exr. pays at the day, the absolute property is vested, if not he has an equity of redemption. —

V. Locatio Operis mercium Vehendarum.

1 May 91 5 917. Bailment of the 5th kind is a delivery of goods to be carried or some other act to be done about them for a reward by the Bailor. This includes a delivery to a private carrier or other private person who is to do some act for and also a delivery to one who exercises a public employment, in his public professional character as a common carrier Inn Keeper &c. —

1 Bac. 343.
3 N.P. 72.
1 Pow. 253.
Jones 50.
127. 123.
144.

Jones. 132 3.
134.

Gilb. L.C. 435.

5th Of a delivery of goods to a private carrier & that is to any person not exercising public business, this includes a delivery to one in a private professional character — as to a Jay lor or other mechanic, to a Bailiff, Factor &c as well as to a special carrier. —

1 May 91 8
Jones. 128.
129. 150.

Bailment.

But a delivery of silver to the silver smith to work into plate &c is not a Bailment of this kind. It is no Bailment but a mutuum, & the property rests in the person to whom it is delivered. —

Jones 143.

Here the Bailment being reciprocally beneficial, the Bailee is in principle bound only to ordinary care, and liable only for ordinary neglect, & so states the Lawyer Scott says expressly that if he use ordinary care he shall not be answerable. — 1 Rol. 4. —

2 Ray. 918. or 913. 1 Raym 254. 4 Mod. 543. 12 Mod. 487. or 437. 1 Vent. 17. Go. 14. 22. 32. 123. 8. 9. 131. 3. 4. 6.

If goods be delivered to such private person, as an agisting farmer for the purpose of depasturing cattle for hire, to a private person to carry &c. &c. & the Bailee be robbed, he is according to the general rule excused, the force being irresistable. —

Jones 129. 30 & Cro. 39. 9 89. 46. 84. 2 Ray. 918. Hob. 131. 1 Mod. 462.

So in case of theft merely, if the property be locked up with reasonable care, the Bailee of this kind is excused. This rule I suppose is general as to Bailment reciprocally advan. but is denied by Jones as to pawns, where according to his own principles the same reasons exist as in the present case. 1 Rol. 4. Mod. 473. —

Jones 128. 129. 133. or 138. 1 Vent. 121. 2 Ray. 918 2 Keb. 5.

If the thing bailed be distrained by the landlord of the Bailee for rent, & be sold as it may be, the Bailee is liable for this at least is ordinary neglect.

Barn. 498. Jones 142. 3. 136.

This rule is common to every bailee who receives pay or compensation any way or of any kind, for keeping or doing as a Carrier &c & generally I suppose where the contract is reciprocally advantageous.

Jones 141. 142.

And depositary would be liable if he should re-

mone his own goods so as to escape the Bailors, or
Jones 142. if he should in any other way unfairly injure them.—
But if the depositary should even act honestly it is
believed that he would be liable to the Bailor in this
Jones 39. case in an action of Trover. If silver be delivered
143. to a silver smith to work into an urn he is not a
Bailee of this kind according to Jones; the contract is not
a Bailment but a mutuum, the property vests abso-
Mod. 20.— lutely in him.— And according to Jones if it be lost, the
Popk. 38.— person to whom the silver is delivered must be on the
2 Bl.— loss at all events, he may therefore use it for any oth-
er purpose, & restore an equal quantity of the same qual-
ity. The reason of this seems to be, that the form of the pro-
perty is to be so altered it cannot be identified, & there-
fore it cannot be specifically restored, in legal contem-
plation. This case is something like that of manufactur-
ing grain into flour, grapes into wine &c.—

When the Bailment is to a person to do some act of skill
Por. 128, in his professional character, here the law implies a two fold
Por 3.— 137, 140. character & contract, not only to redeliver the thing but
1160. 54. to do the work skillfully — as where the delivery is to the
Saund. 324 Tayler or other mechanic.—
Esp. 601.—
3 Bl.—

But if the act to be done be not in the line of the Bailees
Esp. 601. professional business, the law implies no engagement on
Jones. 139. his part that the work shall be done skillfully, & therefore
144.— he cannot be made liable for not using skill without
2. Bl.— an express engagement.—

Bailment.

Ordinary care does not oblige the Bailee to insure the thing
Jones 142. against fire &c. —

If goods of this kind be lost or destroyed
Bac. 1592. while the work to be done remains unfinished, by the neg-
~~1595~~ lect of the degree of care which the law requires of him, —
Esp. 86. it seems he is not entitled to wages for the work which
he has done, for the Bailor received no benefit for the
work which he has done. —

2dly Of a delivery to a person exercising a public employment
D Ray 918. in his professional character, that is in the way of his
Jones 132. professional business — as Common Carriers which are
133. 4. first.

I. Common Carriers.

1 Bac. 343. 4 A Common Carrier is any person who makes it his
20. 34. —
D Ray. 918. business to carry the goods of another for hire — as a com-
Jones. 149.
Cod. 439. mon waggoner or Common Porter or Common Boatman &c
Holt. 60.
Cro. C. 330. when paid for carrying goods — 1 Com. 212. Esp. 619. 621. 1 Rol. 2.
1 Sem. 27.
Ray. 220. It seems formerly to have been doubted, whether any other
Jon. 148. than a carrier by land, fell under the description of Common Car-
152.
Holt 17. 18. riers. The law on the subject of Common Carriers was first exten-
Cro. J. 35 ariers.
2 Mod. 487. ded to Common Boatmen 4 Car. 1. — & to masters of ships the 26
D Ray. 918.
Ray. 220. Car. 2d. — 1 Vent. 190. — 338. 2 Lev. 69. —

Esp. 613. So the owners of ships are common carriers, & the action
Salk. 440.
1 Sem. 18. may be brot. against them, in the nature of an action against
78.
1 Com. 212. common carriers, or against the master. — Show. 29. 101. ~~Carth.~~
Carth. 62.
But according to Stat. 7 Geo. 2d the owners are liable to the
1 Sem. 17. 18. value of the ship only and freight, where the loss is owing

by the mismanagement of the master & mariners. —

1 Bar 347. 3 Bar 1802 Ba. & D 702. Shaw 327. Hard. 163. If a common carrier having commenced to carry, & being offered his price, refuse to carry, he is liable to an action on the case. — 3 Bl.

Notwithstanding the last rule a Common Carrier may make a special, that is a conditional ~~exceptione~~ that he will not be answerable for money &c unless he has notice, & is paid in proportion to the amount. —

Esp 622. Burr. 1293

The Bailment in case of a Common Carrier, being reciprocally beneficial, he would were there nothing to impede the application of the general rule be liable for ordinary neglect only. — And this seems to have been the rule so late as the reign of Hen. 8th. when it was holden that a Common carrier was not liable in Case of robbery, unless his own rashness or imprudence gave occasion to it. —

Jones. 144. Jones. 124.

But it was settled in the Reign of Eliz. that robbery was no excuse. Jones. 145. 1 Rol. 2. —

1 Bar 345. Co Lit 89a Mad. 462.

And the rule now is that he is liable for losses occasioned in any way except by the act of God & the Kings enemies or the act of the Bailor. — Jones. 144. 1 Gem. 27. Skett. 121. 1 Wils 281. a 231.

Sta 123 a. Ba. N.P. 707. Burr 1598. 1 Paus 253. 1 Bar 34. note

The true ground of this rule is not the reward, as asserted by Sir Edw. Coke, but public policy, which makes an exception to the general principle, lest Carriers should combine with robbers to the infinite injury of commerce. —

Jon. 15:14 2 Ray. 918. 1 Bar. 345 Esp 618 Salk. 143.

A Carrier is not liable to this extent, unless paid, because if he carries gratuitously he does not act as common Carrier. —

Esp. 621. Carth 485

A common carrier is in the nature of an insurer at all events

except the acts of God, if by the act of God is meant by
Stra. 128. Lord Mansfield "such an act as could not happen by the
1 Sum 33. intervention of man" as tempests &c. —

Fire occasioned any other way than by lightning is
1 Sum. 34. not considered as the act of God. — 16 Bl. 193. Esp 620.

A rat gnawing a hole thro' the side of a ship, is no ex-
B. N. P. 70. cuse, so that the carrier may be liable for what may be
1 Wils. 281. called an inevitable accident. —
1 Sum 33. 4.

The letting the rat to gnaw thro' &c is said by Jones
to be ordinary neglect. — Jones. 147, 8.

Inevitable accident may perhaps be defined to be that a-
Jones 147 gainst which human prudence (that is any degree of human
prudence) could not guard. that act of God will always
then be inevitable accident of necessity, but this is not
true e converso, for inevitable accidents may happen by
the act of man, as in conflagrations. —

A common carrier is not excused by the act of robbers,
1 Cont. 190. 239. for they are not enemies within the rule; but pirates fall
1 Sum 18. within the rule. — 1 Mod. 85. —
Esp 620.

If a tempest make it necessary to throw the goods
1 Bar 245. 3 Bar 594, 5 of the Bailor over board, the carrier is excused for the ne-
Jones. 161 cessity of doing it is imposed by the act of God: but in this
Esp 620. 12 Co. 68. case the master, owners, freighters & passengers must ave-
2 Phils 240. n. 230 rage the loss according to the law merchant. —

In a case of a box of jewels being thrown over board, the mas-
Jones 151 ter was holden not excused, for the box was light & cause
no necessity of doing it. —

But if a common carrier voluntarily expose the goods to dam-
Esp. 620. age from the act of God &c. the act of God shall not excuse him;
Sta. 128. as if a common Layman had voluntarily put to sea in very tem-
pestuous weather, so that a loss was probable. —

A common carrier is excused if the loss is occasioned, by the
B. N. P. 74. act of the Bailor; as if in the conveyance of a pipe of wine, it
Esp. 621. bursts from being in a state of fermentation

So if the waggon be full, & the owner forces the goods
2 Show. 127. upon him, it is his own folly, & he must bear the loss if any
1 Bar. 344. happens. —

In order to charge the carrier, the goods must have been
Esp. 621. lost while in his possession or under his sole & immediate
B. N. P. 70 care; thus: if the owner send his own servant in a
2 Show 327 boy or vessel to take care of the goods, & he takes charge
Sta. 69 a of them, the carrier is not liable for the goods loss; that is,
1 Bar. 344. I suppose not liable as a common carrier, for they are not
considered as in the carriers possession. —

It is otherwise when they are delivered to a carrier, but a pas-
1 Bar. 340. senger is requested to take care of them. — 1 Rol. 2. B. N. P. 70. —
Cro. J. 230.
Rol. 17. —

It seems that a common carrier, tho' ignorant of the contents of
B. N. P. 70. the box, is liable for its contents in case of a loss, unless he dis-
Jones. 148. charge himself by a special, that is a qualified acceptance —
Sta. 145. Lucas. as to the principle of this rule. —
1 Bar. 345.
Carth. 485.

So too according to two decided authorities, tho' the
B. N. P. 70. carrier is misinformed of the contents by the owner he is lia-
1 Com. 230. 2 13. ble unless he accepts specially; thus where the box contain-
1 Bar. 345. ed a large sum of money, & the carrier was told by the

owner that it contained dirks & the carrier being robbed was held liable. So too where a box contained one hundred pounds, was said by the owner to contain books & tobacco, was lost: the carrier was held liable, because there was no special acceptance. — But Buller Justice says less damages might have been given. —

1 Vent. 238.
3 Keb.
D. of St. 180.

Both of these decisions were disapproved of by Lord Mansfield & the rest of the Court of Kings Bench by whom it was holden that fraud ought to excuse. They are also repudiated by Ld Kenyon, & by Sir Wm Jones who consider the two cases as before as overruled. —

Bun. 1308.
Stra. 145
Jones. 148.

For the purpose of making a special acceptance it is not necessary that there be a personal communication between them & the owner & carrier, — An advertisement in the public papers may be sufficient, that is the jury may infer from it that the owner had knowledge of the terms. —

B. N. P. 71.
Bun. 2298.
Esp. 622
Carth. 485.
1 Ld Ld. 298.
300. note

Under a general acceptance, except in cases of fraud, a carrier is liable for what he carries, but if he accept specially he is liable only as he undertakes to carry, that is he is liable only for as much as his reward extends to; as to any thing over, he acts not indeed as common carrier. — Thus where a bag containing £400 in money was delivered to a common carrier who was told by the owner that there was but £200, & was paid for no more, which bag afterwards lost the carrier was holden liable but for £200. —

3 Bun. 133.
or. 183.
Mod. 158.
1 Ld Ld. 298.
Esp. 622.

Authorities ante. This decision was approved of by Lord Mansfield. But Mr. Gould thinks as the case might be he ought not to be liable to any amount in case of dark deceit. —

1 Bar. 343. 7. Comyn. 25. 232. B. N. P. 70. The Master of a stage coach who received hire for passengers only, & not for baggage, is not liable for the loss of the latter, it would be otherwise however if he had carried the goods for hire. — Esp. 622. — 2 Show. 128.

1 Bar. 343 But common carriers are liable without any ~~special~~ express promise by the owner to pay the hire, since the former may recover on a quantum meruit. —

Owen. 59. The carrier is liable tho' the goods are lost at the Inn where he arrives

1 Bar. 345. Owen 57. B. L. Rep. 917. Esp. 628 & 3. 4 Term. 581. Esp. 623. He is clearly liable in this case if the custom or course of business is for the carrier to deliver the goods to the consignee. & he seems to be liable of course till the delivery to the consignee, unless the established custom is not to deliver them to the consignee —

Esp. 620. When the custom is not to deliver to the consignees, but to keep for he is not liable as common carrier after they are disposed of, that is ~~to~~ deposited according to custom. —

1 Term. 581. When an action is brot. against ship owners as common carriers, they must all be joined, for this action arises quasi ex contractu, and non ex delicto. This rule supposes the owners to have done no wrong. —

Esp. 623. Salk. 440. 3 Term. 651. 1 Bar. 261. 12. The owners are liable because the master is their servant, & because they receive the freight. —

Bailment.

3 or 5 Term 651. Salk. 440. The non-joinder of all is pleadable in abatement only

Com. Law a Postmaster being an office appointed by law, was considered a common carrier for letters &c. But it is now otherwise by Statute 12 Car 2. —

Jones 153. Salk 17. Comb 754. 764.

But the Postmaster will be liable for his own defaults, tho' not for those of subordinate officers. —

1 Wils 443. Comb 765. Salk. 18.

The case in Wilson was against a Deputy post master for his own actual default. —

1 Sid 245. Hard. 485 b. 1 Burr 343.

Com. carriers are said to be liable on the custom of the realm, & the common mode of declaring is to count upon the custom & recite it. —

But this seems unnecessary, for the custom being general is no other than the Com. Law. 227. 1 Bur 343.

Jones 130. 1 Term 33.

When property is stolen from a common carrier or otherwise lost, or injured so as to subject him, he being guilty of no actual misfeasance, the remedy against him is by special action on the case, & not Trover. —

Salk. 655 Esp. 530. Or. 580. 590. Yelv 251. Burr. 2227.

If he be guilty of misfeasance, by breaking a box & destroying goods &c Trover lies. But he is not liable in Trover even for actual negligence. — 5 Co. 147. 5 Bur 55

II. Inn Keepers.

A delivery of goods to an Inn keeper seems to fall most
Jones 130, 1. properly under the second general head of the 5th kind of
Bailment. A Bailment of this description being a delivery of
goods to a person exercising a public employment in his public
professional character, to be carried or some other act
to be done about them for a reward.

Esp. cases under the head of Commodatum a
Esp 625, 6. lending gratis, but there is not the least resemblance be-
tween the two cases. Lending gratis, is to a private per-
son for his use & for his sole benefit.

Buller in his Nisi Prius treats it under the last head,
Jones 132a 182, 3, 4. that is, a delivery to the Bailee to carry or to do some act about
them gratis.

But first, this delivery is always to a person in a private
character, that is, as bailee he is not a public character, - And
2. by the cases of Horses & the hosts care is clearly not gra-
tis, nor in the case of inanimate goods, for in the latter
case his care is rewarded, by another & a gainful contract,
by which he is bound to entertain the owner.

. in detention will apply to an Inn keeper, for tho' the Inn
keeper be not paid in money, yet the guest a lights at the Inn
Jones 133a 1. 5. 3. not solely for his own refreshment but also that his goods
may be safe. Indeed the price paid for a mug of flip may be
considered as extending to the ~~for~~ baggage, in part. Storage

Innkeepers.

for it.—

The general rule as to Inn Keepers, is considered under another title. Under this head I shall lay down a general rule or two.— As to their liability for the goods of guests when lost or ~~stolen~~ or injured.—

1 Bac. 179. 2 Roll. Rep. 345. Any person who makes it his business to entertain & provide necessaries for Travellers, & for their horses for a reward, is a common Inn Keeper.—

Jones. 133. The Bailment being reciprocally beneficial; an Inn Keeper would according to the general rule be liable for ordinary neglect only.— But the policy of the law has

Gilb. L. C. 722. extended the principle somewhat further.— It seems however not so far as the general liability of common carriers.— Does not policy require the same responsibility, as of a common carrier?—

Jones 134, 6. Esp. 529, 8. 6 Co. 32 3. B. N. P. 72. 1 Bl. ... An Inn Keeper is clearly liable for any losses occasioned by his servants in any way for he is bound ~~to~~ at all events to provide honest servants

Jon. 134. & 8 Co. 33 a. Croft 189. So if the goods be stolen by any stranger, the Host is according to the general rule at all events liable.—

There is an exception to the last rule when the

Esp. 621. Co. El. 235. 8 or 3 Co. 33 a. 3 Bac. 183. or 133. 1 Com. 211. goods are stolen by the servant or companion of the guest or by any other whom he desires to have lodge with him.—

So I conclude he is liable for common robbery on the same principle of policy. Robbery perpetrated by such a force as in common presumption he might have resisted.

In Plowden, indeed it was said that if the Inn be broken and the goods taken by the Kings enemies, the host is excused,
Plowd. 9. which seems to imply, that any other human force would not excuse; but I do not find so ingenious a rule laid down by any other authority.

Jones assents it as a rule that a force truly
Jones 135. irresistable does excuse; of Plowden in assigning the reason of the hosts being excused in the case he puts says "for in reason such violence cannot be resisted" I conclude therefore that Jones rule is law.

I do not find any rule subjecting the host to inevitable accident such as fire &c as in the case of com-
Jon. 134-5. mon carriers. I conclude therefore that he is not liable. By the Roman Law he was liable in all cases except where the loss happened thro' inevitable accident.

It is ~~tol~~ holden in Coke that an Inn Keeper is not
8 Co. 33a liable unless there is some default in him or in the part
3 Term 296. Esp 626 of some of his servants. This point is denied by Justice Bul-
1 Com. 211. 219. ler, who says that it is not necessary to prove negligence &c this contradiction is perhaps merely verbal. Cokes idea perhaps is, that whenever the law makes him liable, from whatever cause, he is guilty of a default, from the nature of his implied condition in undertaking the business.

He is liable for such goods ~~as~~ only as are infra
8 Co. 33a hospitium, But the ~~Hos~~ hospitium includes stables. It is other-
32 Esp 626. 1 Rol. 4 wise where the goods are removed out of the Inn by the direction of the guest. It makes a difference with respect to the liability

of the Inn Keeper in case a horse is stolen which is in his ~~hospitium~~ pasture, whether he was put there by the guests orders, or whether the host did it of his own accord

VI. Mandatum.

Jones 73. Mandatum is a delivery of goods for the Bailee to carry,
D Ray. 918. or to do some other act about them gratuitously. It is called
B. N. P. 73. in English mandate, & sometimes acting by commission
1 Pow. 254 The word ~~a~~ commission in its present ordinary acceptation
1 H. Bl. 159 denotes a Bailment to one who receives a reward. —
166.
Gill & J. 416. Mandatum differs from a Bailment of the 5th kind in
this, that in this case the act is done gratuitously, But in Bail-
Jones 73. ment of the 5th kind for a reward; the distinction between
this and deposit, is, that one lies in custody & the other in
feasance.

This contract is for the benefit of the Bailor only
Jones 74 therefore according to the general principle, the Bailee is
1 Pow. 255. liable for gross neglect only; that is a violation of good
or 258. faith, And so clearly is the general rule established
D Ray 909. 919 by the authorities, gross neglect is regarded by the Books
as evidence of deceit or breach of good faith. —

But when there is any engagement by the Bailee to use
Jones 74. all necessary care & skill, or any other given degree, & a loss
1 Pow. 255 happens by his omitting to use it, he is liable & such an
D Ray 909 engagement to use all necessary skill & care may be implied
1 H. Bl. 161. 162. in some cases. —

Such an undertaking may it is said, subject him for less than gross neglect. But according to the case in Heavy Blackstone, or rather in the argument of the Court when the engagement is to do an act skilfully, or when the general undertaking implies that the act shall be done skilfully, the omission of the necessary skill was gross negligence.—

1 Burr 255 Jones 87. 1 H Bl. 161. or 101. 1 Burr 255 Jones 37. or 87. 2 Ld Raym 919.

So according to Holt it is a decent or fraud according to this mode of considering this point, an express engagement to exercise all necessary care & skill, or such an engagement implied from fr. does not work an exception to the general rule.—

But according to the case in Heen. Bl. such an engagement is not implied unless the act be done in the way of the Bailee's profession or occupation.

So Jones makes a distinction between the duty of the Bailee when it was in pleasure or custody only.— In the former case greater diligence is required that in the latter, the implied engagement being to use a degree of diligence proportionate to the performance of the undertaking.—

Jones 73. 74.

The proposition in Heen. Bl. above cited seems contrary to the passage here quoted. But according to the definition of the degree of diligence, the agreement expressed or implied to use necessary care will be equal at least to an ordinary care, & make him liable for less than gross neglect, & therefore it does work an exception to the general rule.—

1 H Bl. 158

This seems to me the proper mode of considering it.

Jon. 74. 87.

When there is no agreement expressed or implied to use

shall a more care than the Bailee takes of his own goods, the Bailee is liable for gross neglect only. Thus:
Jones 74. where a Merchant engages to enter B's goods with his own
10 Pow. 255. gratis at the custom house, but entering them with his own they are seized, because he enters them under a
18 Ch. 158. wrong denomination with his own goods he is not liable.

It would be otherwise if a taylor engages to make a garment gratis, for here the undertaking implies that all necessary skill & care shall be used in the making.

So in the case of Coggs vs Bernard,
2 Roy. 910. Powell Justice intimate that the special asst. to carry safely was what subjected the Deft.

Jones contends that the nature of the Bailment implied the same thing. This however is doubted
Jones 84. 85, 7. as the opinion of Powell seems to be correct. Besides Jones himself says that the Bailment to carry gratis does not imply an engagement by the mandatary to use all necessary care, & that he is liable for gross neglect only. But I can see no distinction between doing & carrying.

The engagement thus implied extends however it
2 Roy. 918. seems only to the feasance or damage of the act stipulated.
10 Pow. 255. It does not provide against acts or accidents not connected
B. N. P. 3 with the performance of this act. Thus in the case of the taylor who works gratis, the implied condition does not

extend to guard against robbery. — So far as it relates to such accidents, there is no implied agreement to use all necessary care, if the Bailee is liable for gross neglect only. — So I apprehend is the distinction in the case of Legg's vs Barnard, for the engagement was to carry the goods safely. — Yet says Justice Powell, if a Drunken man had pierced the Cask the Bailee would not have been liable. —

But the Bailee may bind himself to be liable for casualties. — 2 Ray 919: 915. —

Jon. 75. 2 Ray 910. Jones 62.

Yet this promise to carry safely does not make him liable for ~~that~~ answerable for losses occasioned by the act of God. I apprehend it does not subject him to any loss happening without some degree of neglect. —

Jon. 66. 75.

The mandatary cannot even by a special agreement exempt himself from liability for fraud, such an agreement being <u>contra bonos mores</u>. —

Tho it seems from the language of some of the Books, that when any degree of care is expressly or impliedly stipulated, the omission of it is gross neglect; yet the authorities are equally clear that on delivery of the thing, the engagement binds as a contract, tho, not before delivery. —

2 Ray 909. 910.

6 Jam 143.

In the case to build the house gratis

1 Bac 341. 2 H. St. 129 12 Mod 487. 5 Jam 119: 150.

Holt holds that the delivery of entering on the trust is a good consideration. Yelv. 4. 128. Cro J. 667. 2 Ray 920.

When special damages have been sustained by a

Jon. 76.80. 5 Sam 143 149. party ~~not~~ for not taking the goods according to agreement, an action lies according to Jones, tho the promise is gratuitous. But this is pointedly denied by a recent decision.—

3 Sam 51 Jon 78.90. If however the promise was made with a fraudulent intent, the action would lie.

Jones says the ground of action in the above case Jon. 79.90 is the special damage; this is undoubtedly correct if the action lies.—

But special damage is not necessary where 2 Ray 909 910.919. 920 the thing had been delivered. for if the goods be actually delivered to a carrier to carry or ~~he paid for~~ to carry, an action lies for the failure on the agreement, tho no special damage be sustained, a fortiori it lies if there be special damages.— Jon 78. 88.

So if he injure or lose the goods by omitting 5 Sam. 143. 150. 149. the degree of care promised. It is said in Roll that the negligence & not the Agst. is the cause of the action; but the 2 Ray. 910. 919 rule is otherwise laid down by L. Holt.— If the mandatary be not liable on the promise, how can the promise extend his liability? Without a promise he would not Jones 68. 1 Roll. 10. be liable in this case. the promise is therefore the cause of the action.—

Further rules are to follow applying to different kinds of Bailment.—

I. As to the Bailee's right to detain

A lien so called, exists on property in the Bailees favor I apprehend only in the fourth & fifth kinds of Bailment. A thing I conceive a direct claim to an incumbrance upon some special property of another by way of a security for a debt.—

1 Com. 258. Cro. J. 244. Yel. 178. Salk. 522. Esp. 583 Ro. Ab. 419. In the fourth kind of Bailment viz, by pawning, a lien is created by the delivery itself, without any thing ex post facto, if the pawnee had a right to retain until the debt is paid

Most Bailees of the fifth kind, that is where there is a delivery of the goods to carry for a reward, ~~upon~~ have D Ray 732. a lien upon the goods, by a condition in law, till they Cro. 752. 367. 867. are paid, but some have not.— Burr. 2 826.

Bur 2 69. Salk 654 A common carrier has of course a lien upon the goods, that is a right to detain till paid; tho' the contrary is asserted by Powell Justice.—

So it was said by Holt that if goods were stolen, & delivered by the thief to a common carrier, he may retain them even against the owner till paid.—

Esp. 584. Bac. Ab. 45. 3 Bac. 155. 5 do 269. Salk. 388 Cro. 338. 1 Rol. 444. An Inn keeper has also a right to detain the horse of his guest till paid, for the expence occasioned by the horse.— D Ray. 868.

So tho the horse be left at the Inn by a stranger he may detain it, as in the last case of com. carriers, &

Bailment.

2 Show 166. for the same reason. 3 Bar 185. Yel. 67. 2 Roll. 85. Poph. 128.
1 Ld. 880. 147. Poph. 979. Esp 584. 3 Bar 185. 2 Rol 86.

So he may detain the person of his guest.—

3 Bar 186. 2 Rol. 35. or 85. A horse cannot be retained for the entertainment of the owner.

Esp. 534 or 584 The Inn keepers lien is lost by letting the horse go out of his possession.— Sha. 557.

So the taylor or other mechanic has a

1 Bar 240. 3 Bo. 147. Holt. 42. Yel. 67. lien, the condition is annexed in behalf of trade and commerce, for the taylor is not bound to receive the cloth.—

But when a taylor is in the habit of trusting an

1 Bar 240 employer, he ought not to detain for he gives a personal trust to the Bailor.—

The agisting farmer cannot detain

Esp 685. 1 Bar 240. B & N.P. 45. Cro. 197. his cattle for his pay, because he is not obliged to receive them, & the interest of trade & commerce do not require that he should have a lien.—

But when there is a special agreement on which

Esp 385. or 885. 5 Bar 271. Yel. 66. 2 Roll. the Bailee relies, he cannot retain the goods. ~~But~~ And it has been holden that a special agreement to pay a sum certain, without more, would oust the right to detain,— as in the case of the farrier frequently mentioned in the Books for there the Bailee does not rely on the property for security

1 Com. 228. 3 Dem 119. Amb 254. So a factor has a lien upon the goods of his principal, in his actual possession, but he cannot

Bum 494. pawn them tho' he may sell them. Bl. Rep. 1154.
Esp. 108.
1 H Bl 362. The factors lien is lost by giving up possession to
4 Bow 227. the owner. Bum 4934. - 5 Term 604. 7 do 369. Stra. 117.

A Bailee of the second & third kind, viz a borrower or hirer, has a right to keep the property for the
1 Bar 240. Yel. 172. time stipulated even against the will of the Bailor - as where a horse is hired for a journey. This is rather
1 Rol. Ra. 128. a special property than a lien. -

Rights of Strangers how far affected by Bailment. -

If one hath the property of another, the Bailee it is said
1 Bar. 237. 242. must deliver the property to the Bailor according to the terms
1 Rol. 604. 607. of the contract, for the Bailee cannot judge between the owner & the Bailor, but ought to perform his contract. -

But it is doubtful whether this rule means any
Rol. 607. thing more than that the Bailee will be justified in de-
1 Bar. 242. livering the goods back to the Bailor, that is, will be
F. N. B. 137. discharged of the owners claim by this act. -

For it is laid down by Roll that if the Bailee is delivered the property to the Bailor, before or pending the action against him by the owner, this will bar the owners action. -

If indeed the owner does not exhibit sufficient
D Ray. 869. evidence to the Bailee of ownership, the latter ought not
Esp. 599. to be subjected. But if sufficient be afforded the Bailee would be liable, I apprehend unless he had discharged himself by delivering to the Bailee ut supra; in the case

in Lord Raymond where the owner brought his action against a common carrier for goods stolen, it was holden that the ~~owner~~ carrier ought to retain for the carriage till paid.—

But if a Bailee in a case of this kind
1 Ba. 237. dies if his Exr. come into possession of the property. The
1 Rol. 107. Exr. must deliver to the owner if not to the Bailor, for having gained possession by law, he must deliver to him who in law is the owner. - the Exr. is not bound to a testator's personal trust.—

As to the rights of the Bailee's creditors who levy on the property as his and of purchasers under him.—

3 Co. 80a. By the Stat. 13 Eliz. made to avoid fraudulent sales &c
2 Ba. 601. to defeat creditors, if a purchaser of goods leave them
Esp. 540. in the possession of the vendor, the bill of sale &c being ab-
2 Term 587. solute, the creditor who levies on them will hold against
1 Co. 432. the purchaser, such sales being in general to secure property, of having tendency to give false credit to the possessor;
1 Ath. 180.
2 Term 596 of hold out false colours to the world in his favor; Here the rule is founded on the original sale's being fraudulent against the creditors of the vendor, so that the original purchaser acquires no title to against them.—

The law therefore as it stands under this statute does not perhaps fall under the head of Bailment strictly speaking.—

For when the hair-caution is within this Statute, the vendee as he acquires no title against creditors is not properly speaking (so far as they are interested) to be considered Bailee. This law however having a close connection with that on Bailment ought to be noticed here.

But if the event of immediate possession lie inconvenient with the deed of sale, as where the deed is conditional, it is not of course fraudulent, for by the terms of the deed the vendee cannot have possession till the condition is performed — here the presumption of fraud is rebutted. —

2 Sem 595. 596 7. Esp 541. Comp 432. 1 Wh. 167.

So when the nature of the sale is such that immediate actual possession cannot be given; as in the case of the sale of a ship at sea. Indeed the delivery of the bill of sale is in this case considered as a delivery of the ship.

2 Sem 468. 466. 1 Vez. 365.

Were if the condition be subsequent as in case of a mortgage of goods, will the mortgagor's remaining in possession till the day of payment bring the case within the Statute of James 1st?

1 Vez. 365. 2 Sem 463. 466.

In the last case the want of immediate actual possession will not make the sale fraudulent, it may doubtless prove fraudulent from the facts indicating fraud if there be any. —

The Statute 13 Eliz relates only to creditors, & not to purchasers, & is in affirmance of the Comm. Law only as to antecedent creditors. —

But Lord Mansfield says that the Comm. Law has

3 Bac. 60. 3 Co 83. 6 Co Lit. 290. Comp. 462.

attained every end proposed by the Statute; the consideration that false credit is given, holds more strongly in favor of such subsequent creditors than prior. —

2 Sum. 596. 7 Ves. 70.

If the want of immediate possession be not consistent with the deed, it is fraudulent per se in point of law, & not merely evidence of fraud. —

By Statute 21st James 1st If a person when he becomes a Bankrupt have in his possession, order, & disposition goods of another by the latters consent, they are liable for the Bankrupts debts. —

Esp. 566. 10 Ath. 166. 1 Ves. 347. 7 Sum 228. 8 Sum 82.

The Statute extends to goods not originally belonging to the Bankrupt, but bailed to him or permitted by the owner to be in his possession, as to such as were originally his. —

Comp. 232. Esp. 529.

As to goods originally belonging to the bankrupt & by him sold but permitted to remain in his possession, the rule was as strong in favor of his creditors, before the statute as now, for by the Statute 13 Eliz & at Com. Law, the sale would have been fraudulent against the creditors of the Bankrupt. —

Comp 235 3 Co. 81.

The rebutting of any presumption of fraud, is it seems of no avail under this statute. — 1 Ves. 365. —

10 Ath. 180. 183.

This Statute extends as well to mortgages as to abolute sales, where the vendor is left in possession, and becomes a Bankrupt. —

10 Ath. 165 4 Ves. 348. 1 Wils 260.

If the creditors claim the property precedent to the vendors right of possession, it would not appehend be within

1 Ves. 165, 9

the statute, for the purchaser does not voluntarily entrust the vendor with the property, of which he has the right of possession. —

1 Atk. 160. The statute does not extend to ships at sea 1 Vez.
Esp. 166, 8. 485. 491. 352. 4. 361. 2, 6. —

So in many other cases a manual delivery is
7 Term 71. not necessary under special circumstances — as a delivering a key of a store containing the goods is sufficient. —

The goods must be possessed by the Bankrupt as his
Cowp 233. 1 Atk. 185. own goods are, or in other words they must be left in his
Esp. 567. possession, order & disposition, or the case is not within the
570 3 Term. 316. statute. —

Therefore a temporary possession, for a particular purpose — as till an opportunity offered for sending the
Esp 567. 1 Atk. 185. goods to the vendee, is not within the statute. —

So the Bankrupt must appear in all cases to be
Esp 570. 1 Wils. 318. 3 Ad. 185. the owner, to bring the case within the statute, for if from the nature of the business, the presumption of his ownership is excluded, the true owner shall hold, as in the case of a factor, goldsmith &c who do not deal in their own stock. The statutes 13 Eliz & of 21st Jac. 1st are in favor of creditors & not of purchasers. —

The statute 27 Eliz. is in favor of purchasers. The
2 Bow. 602. Cowp. 434. Comm. Law however would have attained all the ends of both of the statutes of Eliz & the statute of 21 Jac. 1st so far as it relates to the rights of persons imposed upon by giving false credit, it is in affirmance of the Comm. Law.

Bailment

In common cases of Bailment, when the Bailee was not such a Bailee as to bring the case within the Statute 13 Eliz. or is not in possession or disposition, so as to bring it within the 21st James 1st & when he does not become a Bankrupt, the general rule is, that the true owner, that is that the Bailor may have trover against the purchaser under the Bailee, or any subsequent purchaser, or a Creditor who levies on them as the Bailees, unless the sale was in the market overt, & so against any person into whose hands they might have fallen, however honestly they may have obtained them.—

Esp. 578. 1 Wils 8. Str. 187. 3 Ath. 44. Salk. 288. 5 Bac. 260. 266.

This rule it seems is founded upon convenience in England. It has been several times suggested that the possession of Chattels, ought as against third persons who trust to it, to be considered as evidence of ownership.—

2 Term 376. 4 do 640.

There is an exception to the last rule, when the property Bailed is money or Bank bills, there is a regular bona fide transfer by the Bailor, tho' not in the market overt, it binds the property.—

Esp. 579. 580. Salk. 126. Burr. 1516. Bl. Re. 485.

When the goods are left with the Bailee merely to keep, no purchaser can hold them against the Bailor, for they are not with the order & disposal of the bailee and therefore cannot be sold without a violation of the terms of the Bailment.—

10th 185. Esp. 567.

Nor will a Creditor be hold agst. the Bailor, if the possession of the Bailee be so explained

as to exclude the presumption of fraud.

The law it seems would stand upon a much more rational foundation, if this broad principle were made the general criterion of judging by; viz. that when one of two innocent persons must suffer, by the act of a third, he who trusted the third person enabled him to do the wrong should bear the loss, rather than he who has not trusted him. —

2 Law. 70. 5 Co. 176. Dagg. 72. or 22. 1 Eq. 360.

If goods be bailed for hire to be used by the Bailee for a certain time; it is a question whether the Bailees creditors can take the use of them for the term of limitation in Execution. —

7 Term 11:12.

It would seem by a doctrine of a Judge in Term. Rep. that he might take the property. But it is a personal trust if not transferable by the Bailee —

The sale or mortgage of a ship at sea is valid, if the grand bill of sale be delivered to the mortgagee or vendee if he take possession the first opportunity after the ship arrive in port: 1 Term 462.

As to where the continuance of possession is consistent with the original ownership See Esp. R. 574 Comp. 432: 2 Bos & Pull. 59. 3 Esp. R. 52

Comp. 437. Possession of goods is evidence of Fraud. Scene of a sale

Bailment.

To what actions Bailees and Bailors are respectively entitled.

5 Bac. 164 261
Latch 214.
2 Bulst. 268.
1 Roll. 4.

It is a general rule that the bailor having the general property may have Trespass, Trover &c against any person who takes or injures the thing in the Bailees possession. See 4 Term 489.

5 Bac. 164 261
Latch. 214.
Sid 438.

So tho' the Bailor had the actual possession, as in the case of a Bill of sale of goods not delivered, for in personal things property draws after it a possession in Law. —

1 Term 480.
4 do 489
n. 439.
7 do 9.
Esp 383
576.
1 Bulst 68.
1 Bach 135.
136 note.

If goods be bailed for hire to be used by the Bailee for a certain time, it is a question whether the Bailor can maintain trespass or trover against the stranger for taking or injuring them during that time, but it seems that he cannot for there must be a right of possession to maintain the action.

Esp. 577.
Str. 955.
5 Bac. 164.

If goods in possession of A are by B the owner given to C by parol of a stranger afterwards takes them or injures them while in A's possession. C cannot have an action against the stranger, for C is not in actual possession, & a parol gift without delivery does not transfer the property, & therefore cannot give a constructive possession. — Thus he is not strictly Bailor. —

~~Str. 955.~~
Esp. 577.

But slight acts will amount to a delivery. A delivery for instance to the donees servant, is a delivery to himself. — Esp. 14 Cowp. 194. 296.

5 Bac. 164.
261. 1 do.
237.

If the Bailee give goods to a stranger the Bailor cannot have trespass against the taker, nor in the first in-

1 Rol. 606. stance trover, for the stranger gains possession lawfully. —

But if on demand & refusal the Bailor exhibit evidence
1 Bar 242. 1 Rol. 607. of ownership, he may have trover against the stranger, tho
D. Ray 867. the stranger may discharge himself by delivering to the Bail-
Z. L. B 137. ee before or during the action.

So most Bailees & Tenancies all may main-
Tho. 505 1 Bar 346. 5 do 165. tain actions of trover & for the full value against a wrong-
262. D. Ray 276. doer, — as a common carrier, a special carrier, an assistant &c
B. N. P. 33. Esp. 577: 1 Mod 31. 545. Salk 143. —

The ground of the Bailees right to sue as above
5 Bar 164, 5. 545 Co. Lit. 89. is said to be his own liability to the Bailor. — Lid. 438.
but therefore it has been doubted whether a deposi-
5 Bar 165. 262. tary can have an action of trover &c against a wrong-doer
under a general acceptance or an acceptance to keep as his
own, because he is not liable in these cases except for fraud.
But this is questionable, for every Bailee has a special proper-
Jones. 112. 1 Bar 240. 340. 5 do 262. 7 Term 392. 396. 397, 8. by in the thing Bailed, & is not this sufficient to give a
right of action against a stranger, & this liability to the
Bailor I apprehend is not the true ground of his
action. —

It has been holden that a finder has such a pro-
Tho. 505. Esp. 575. perty as will enable him to keep the thing against all
but the rightful owner, & consequently he may maintain
trover. —

So according to a late decision an uncertificated
7 Term 396. 396-78 bankrupt having acquired goods after bankruptcy, may
have trover against the stranger who shall take the

goods out of his possession, tho' the case does not very nearly resemble that above, yet it was there holden that a special property, or even a lawful possession is sufficient, against a wrong-doer.

Besides the depositary may by possibility be liable, as in the case of gross neglect, this seems sufficient on the ground of the Bailee's right to sue, is his own liability, for no bailee is liable at all events. & how shall it be determined before hand, in any case ~~that~~ that there is an actual liability.

The principle advanced that the bailee cannot maintain the action unless he is liable would be an equal objection to any one's right to sue unless the question of actual liability were ~~questioned~~ tried by the Bailee against the wrong-doer, but this would be clearly inexpedient, for the decision would clearly not bind the Bailor.

Also policy requires that the Bailee to keep, should have the right, for the Bailor might be at a distance and a special remedy necessary.

Further if the ~~Bailee~~ depositary have a special property, will not the law protect it? his right is of a higher nature than that of a stange, as against the stange he may be considered the owner, he having a lawful possession which the stange cannot have.

If a Bailee deliver goods to a stranger, the stanger it seems may have an action against

1 Bar 242. 5 Ba 260. 2 Ba. . . Rob. 607. any third person, who violates his possession, for he it is said has a special property & is liable to both the Bailee & Bailor.

1 H Bl. 81. 2 Ca 591. Bu 190. 1 H Bl. 82 An Auctioneer may maintain an action on a contract for goods sold, against the buyer, tho' the goods are known to belong to another. He is a kind of broker, a fortiori a factor may have such an action. —

13 Co. 69. 5 Bar 165. 263. When the Bailor & Bailee have a right to sue for the full amount, there can be but one recovery, that is, for the full value. Therefore a recovery by one in trespass or trover bars the other's action —

2 Rob. 568. 8 Vin. 22. But it is said in Roll that if both sue, he who first recovers shall oust the other. —

3 Bar 559. 3 Atk 127. But Mr Reeve thinks the commencing of an action for the full value by one, ousts the other of his action of the same nature, a right of recovery being attached by the suit

5 Bar 280. 2 Ray 1217. Cro. 624. 35. 3 Lev. 124. Yel. 68. But if the Bailor have recovered satisfaction of the wrong-doer, he clearly cannot maintain an action against the Bailee for he can have but one satisfaction. — Esp 319. Salk. 11.

Esp. 610. 612. Cro 677. 109. According to Mr Reeve, if the Bailee commence an action against the wrong-doer, the Bailee is discharged, that is, the Bailor thus waives his action against the Bailee. — Hutton 98.

I find no authorities in point but if it be true as above

5 Bar 179. Salk 248. 1 Mod. 663. that the Bailor by commencing his suit against the wrong doer ousts the Bailee of his action, the rule on principle must be as laid ~~down~~ down. It is analogous

also to the case of rescue & escape, in which if the Plt. prevails against the ~~owners~~ rescuers, the Deft is discharged. —

It is also analagous to other cases of electing one of two remedies. 1 Mod. 663. —

5 Bac. 179. Salk 248.

Thus if beasts be distrained damage feasant an action of trespass does not lie for damages done, but the possessor of the land had his election as to two remedies.

So according to the Rescue of the Bailee sue first for the full value he makes himself liable at all events to the Bailor. This must undoubtedly be the case if the Bailee by commencing his action for the full value sues the Bailor of his. —

3 Com. 65. —

So the Bailee may have an action for his special damages, tho' the Bailor has recovered the full value according to the general rule, damnum cum injuria gives an action —

3 Com. 65.

If the Bailor himself take the property from the Bailee, before his special property is determined, the latter may have a special action on the case against the former, but it seems he cannot have trespass or trover for these actions are for the full value. — Besides of the Bailees right to have trover for in any case, it is founded upon his possible liability to the Bailor, the foundation of such an action fails as against the Bailor if his special property only gives him a right to these actions a-

5 Bac. 185 266. Esp. 401. 1 Bac. 62.

against strangers I conceive.—

1 Ro. 359. 361. The thing is not the Bailees he has only the special property entitling him to the custody & use.—

It is said in Coke that the Bailees ownership should mitigate damages. But I apprehend in all cases where damages are merely mitigated when the full value is sued for, as by retaking the property before suit, in the case of trover, the Plff. has originally a right of action to recover the whole, which action cannot be defeated by any subsequent act of the Deft., tho the damages may be lessened. But the special damages may be greater than the amount of the property, & damages cannot be encreased in an action of trover.

Esp 6 81. 4 Term 260. If the Bailee contrary to the Bailors orders deliver the goods to another, he is guilty of a conversion, & trover lies against him without demand.

1 Bar 237. 4 Com 258. B. N. P. 72. Bro J. 244. Bro Ch. 781. Generally the Bailor can maintain no action against the Bailee than case; a special action on the case for negligence, trover for a conversion, or assumpsit on the promise to redeliver.— 8 Co. 146. Peak. 191.—

Co Lit. 57. 5 Co. 13. Trespass will not generally lie because the original possession is lawful.

But if the Bailee destroy the goods the Bailment is extinguished & trespass lies. 2 Term 465. 5 Com 531. 5 Com 581. Mod. 248. 3 Atk. 46. — 5 Bar 2 66.—

Bailment.

As to payment under a void authority See. 1 T.R. 62. –
Lex Merca. 404. 3 T.R. 125.

Bailment.—

Contracts.

1 Pow. 6..
2 Bl. ..

A contract is an agreement upon sufficient consideration to do or not to do a particular thing.—

A written contract not under

7 Term 143. seal is in Eng. considered as a parol contract, but in Con^t. it is considered as a specialty.

By that law of in equity, it is

5 Term 143. essential to the validity of a contract that there be a consideration, or that the contract be such that no proof can be admitted to show that there was no consideration.

A man cannot be compelled either at law or equity, to fulfil a contract entered into without consideration, unless the nature of the contract precludes all enquiry respecting the consideration.—

The quantum of consider-

5 Term 373 ation is not however regarded. Tho' if the thing spe-
2 Pow. 147.
152 cified as the consideration have no value as rush the contract will be void.—

But it is not easy to discover how a Pepper Corn which is a sufficient consideration, is more valuable than a rush.

The relation of Land Lord and tenant is a sufficient consideration to support a promise.

It is a common opinion that a written contract

Pow. 1639 1663. 1 Pow. 388. 3412. 2 do 242 3 Fonb. 326. 338. 2 Sum. 680. 3 do 421. 7 Sum. 350 351. note 497.

under hand & seal acknowledging a consideration is valid without a consideration. But a written contract itself is considered no more binding without a consideration than a parol contract would be; for if from the face of the writing there appears no consideration, it is void. Were is it void, I may not nominal damages be recovered.—

But if it do not appear from the face of the writing that there was no consideration, the contract if reduced to a specialty, will be binding as to the parties; parol proof being inadmissible to prove the want of consideration in a special contract, unless the rights of third persons are affected by the contract.—

3 Sum. 438.

The consideration of a contract expressed in a deed is conclusive as to the existence, kind, & extent of the consideration between the parties; but it is only prima facie evidence as to the quantum.—

On voluntary single Bills or covenants only nominal damages are recoverable, the consideration, being I suppose examinable.

If a consideration be acknowledged & it does not appear from the face of the writing, whether it is sufficient or not, the parties cannot go into an enquiry respecting it, but third persons interested may, and tho' a valuable consideration should appear upon the face of the writing; yet third persons may prove that there is no consideration.—

Quere. Are ~~as~~ even nominal damages given if it appear from the face of the covenant that there was no consideration - Can want of consideration be proved if the covenant expressly acknowledges a consideration. -

If the consideration of the contract be illegal it may be enquired into, as between the parties themselves. -

1 Pow. 146 & The undue advantage taken of a mans situation, being unconscionable, vitiates the contract in equity tho' not at law. -

1 Ford. 60. 3 Ves. 229. 1 Pow. 31 - 2 do. 228. Equity will relieve against fraud or imposition practised upon persons of weak minds, as also where parental influence is used to induce a child to enter into a contract

1 Ferr. 153. 3 do. 370. But if the parties to a contract were upon an equal footing, if no imposition or undue influence was practised, equity will not interfere tho' one may have obtained the advantage in the bargain - Courts of law even where there is no actual contract will upon the idea of an implied contract compel the payment ~~even~~ of money which is justly due. -

Principles of policy indeed prevent Courts in some few instances, from lending their aid; but when no such considerations militate against private justice, the Court will in all cases compel a Deft. to pay over money which in good conscience he cannot retain & to which the Pltff. in good conscience is entitled. -

Esp. 164 Esp. Rep. 246. 7 T.R. 241. A contract merged in a security, revives when the se-

1 East R. 58. cunity is avoided, if Justice requires its renewal. –

A parol contract is not merged by being reduced to
1 Bro. 218. 223. 423. writing, but if a Bond or other security which moves the
Esp. 96 consideration out of sight and enquiry, be given; the par-
1 East R. 246. ol contract is merged; if a written contract expressing
7 T.R. 247. the consideration may be merged in the same manner
Ibid. 127. Here as to a debt which is to accrue in future, as an
2 Term 433. annuity, payable by installments when a bond is given
to secure it the bond acknowledges a present debt. –

A person cannot by performing part of an entire con-
tract entitle himself to recover the whole. –

Persons by law disabled to contract

It is a general rule that all persons who have not the physical or moral powers to contract, or who have not the exercise of their powers, are by law disabled from making a valid contract – An assent it is said is necessary to the binding force of every contract, if an assent in consideration of law involves the free & deliberate use of those powers; therefore the absence of either of these powers in either party to the contract, renders that party incapable of binding himself by such contract or agreement.

These observations according to Mr Reeve apply in all cases of express contracts. But when the contract is implied, an assent is not of course necessary. It is a common opinion among lawyers, that the binding force of such contract depends upon the implied assent, but it is

apprehended that this is in error; for the true ground on which such contracts are enforced is, not that there is an implied assent, but that it is a just right, that they should be performed.—

There are some cases in which an implied assent is apparent, but there are others in which it cannot be implied. Thus where a husband turns his wife out of doors & forbids all persons to trust her on his account, he is bound by her contract for necessaries, & this it is said on the ground of implied contract; yet plainly no assent can be implied for the term assent denotes "the acquiescence of the mind to something proposed or affirmed," & in this case there is an express refusal.—

1 Raw. 10.

There are several descriptions of persons who fall under the rule first laid down.—

I. Idiots, Lunatics & persons of no sound memory are incapable of assenting. Their contracts are therefore not merely voidable but absolutely void.— and they may always plead non est factum. This rule is evidently a just one, but there seems now to be a current of opinions, that a lunatic or cannot take advantage of his lunacy to avoid his contracts.— This opinion is as old as the year Books, yet the only reason assigned in support of it, was, that no man shall be allowed to stultify himself. But the heir at law of such Lunatic or it was admitted

1 Raw. 11. 4 Co. 123. 3 Mod. 196. 301. 2 Ray 313. 316. 1 Vent. 198. Co. Ch. 398. 612. 393. 622. 4 Co. 123

might avoid the contract of his ancestor.— Courts seem to have held that it was indecent for a man
Pow. 11. to stultify himself, but that his child or whoever his heir was might do it with propriety. Fitzherbert in
Fonb. 41. 2. his Natura Brevium attempts to prove that that was not always the law, & Blackstone in his Com. evidently ridicules the opinion by his mode of considering it.— The opinion however is supported by many modern opinions.—

Powell indeed assigns no additional reason in support of this rule: he maintains that if a man were allowed to stultify himself it would open a door for fraud.

This argument however carries no more force when urged against a man's
1 Fonb. 47. stultifying himself, than against every mode of avoiding the contracts of ~~infants~~ lunatics, since in whatever manner they are avoided the same danger of fraud exists.— But it is settled that the contracts of lunatics may be set aside ~~in~~ two ways.

1st. Where a Jury have found a man a lunatic,
1 Vent. 414. the King as his legal guardian may avoid all
3 Atk. 107. 170. contracts made by such person after he becomes a lunatic.— 10 Wm. 2. n. 119.

2d. A suit may be brot. forward by the Attorney General in
1 Eq. a. 278. Chan. with whom the lunatic may be joined to avoid all contracts after the lunacy commenced. On application to

the Chancellor, Commissioners are appointed to examine wheth-
er a person is a lunatic or if he be found a lunatic a
sure facias will issue for all Creditors to ~~issue~~ shew
reason why his contracts should not be set aside.

Now what possible objection exists against
the lunatics avoiding his contract at Law, which does
not lie against the Attorney General's avoiding it in
the lunatics name in a Court of Chancery?

II. The second class of persons disabled from contracting are
drunken men: their contracts are with certain qualifications
voidable. There has been no decisions upon this point in
a Court of Law.

The general rule adopted in the Ct. of
3 Bro. W. 131. Cann. is this; If one induces or in any way causes an-
231. other to be intoxicated & then takes advantage of his
1 Ves. 19. situation so ~~as~~ as to overreach him in a bargain, the
1 Ford. 62. bargain is avoided in Chancery.
3 N. R. 72.

But if a person find an-
other drunk & take advantage of ~~him~~ his situation,
to make an unfair contract with him, there is no deci-
ded case that warrants the interposition of Chancery to
avoid the Contracts. Yet as an undue advantage
is taken of another's situation in this case, it would
seem that upon principles adopted by Chancery in
other cases, the contract might be avoided.

If however in the case above, the contract be not un-
1 Ves. 79. reasonable, ~~then~~ Ch. Cann. will not interfere, tho' the drunk-

cases of one of the parties was caused or induced by the other. There is at least one case of this kind.—

The general reason why all contracts entered into by drunken persons may not be set aside is founded upon policy, since such a rule would lead to dangerous consequences, in a Country where the opportunities for intoxication are frequent.—

If money be taken from a drunken man without any consideration, an action of Indeb. Asst. lies to recover it; This action whenever it lies is concurrent with relief in Chancery.—

III. In case of contracts made by persons of weak minds, the degree of weakness that will warrant the interposition of Chan. is matter referred to the discretion of the Chancellor. Indeed Courts of Chan. deny that they ever set aside contracts on the ground of weakness in one of the parties, they being we are told no Judges of the weakness of intellect. They assign fraud for the reason of their interposition.

Fonb. 56. 63. 65. 3 P. W. 129.

But the fraud in one party is evidently weakness in the other, & the former cannot be supported from the cases decided without first supporting the latter.—

If unfair advantage be taken of a person whose mind is weakened by sickness Chan. will grant relief.—

IV. The contracts of Femes Covert & Infants have been considered under other heads.—

Of the binding force of contracts as to the parties & others.

Some persons may by their contracts bind not only themselves, their Heirs, Exors &c but others also; as for example heads of corporations, Select men of a town, agents, attornies &c Legents, Attorneys &c can bind their employers only when specially authorized — Select men have a general power. —

Heirs, Exors & Admrs are bound by covents of their
Comb. 64 A. Ancestors &c if they have assets. —

An heir may be compelled in Chancery to carry into
2 Vern 213. effect the agreement of his ancestor.

A joint-tenant may also be compelled to execute an
1 Vern. 63. 2 do 634. agreement or covenant made by his deceased fellow tenant to convey — Chancery considering the joint estate as severed, from the time, at which the covenant to convey was made.

A husband is in many cases bound by the contracts
10 Ro. M. 393. of his wife. —

A subsequent mortgagee is prefered to a prior mortgagee; if the latter acquainted with the subsequent mortgagee does not give information that the property is mortgaged to himself. —

If a prior lessee urge a second to take a lease of the lands leased to himself from the lessor, the second is prefered. —

If a settlement is made of intailed lands, as a

jointure in bar of Dower, if the person entitled to the remainder in tail knowing of the transaction, does not give notice of his claim, his right shall be postponed to the jointure.

1 Vez 239. If a person holding a bill of exchange fail to give notice to the Drawee, when it is dishonored, he shall
1 Burr. 169. lose his claim.

If a grantor of lands expressly inform the grantee that he shall not have ingress over his the grantors land, the law will not withstanding give the grantee the right of ingress if it be necessary. --

A grant to a lunatic is good — So a bona fide grant
1 Burr 269. to one who knows nothing of the grant, is valid if afterwards assented to by the grantee. -

If a party contracting is igno-
1 B & W. 239.
726.
3 Ch 316.
3 Burr 757. rant of his right, such ignorance will sometimes invalidate the contract.

But a compromise of a dubious title, is binding
2 Ver. 196. notwithstanding the ignorance of either of the parties. Igno-
Mosely 364. rance of the Law it is said will not exonerate a party from the obligation of his contract. —

But this rule does not appear
2 Ver. 196 to be strictly true. For in the dispute of two Brothers respecting the right of inheritance, referred to the school master & afterwards settled between them by agreement, the only ground on which the agreement was set aside was, the ignorance of one respecting a rule of law.

On the same

ground was an orphan relieved, against her own election of a less sum than she might by law claim. —

Contracts capable of being affirmed or avoided. —

Comp. 201. 1 Fonb. 132. Doug. 53. 2 Term 766. A voidable contract may be ratified by matter ex post facto - as a subsequent promise; but a void contract cannot. —

A contract obtained by duress, may be affirmed after the duress; yet if it be affirmed under ignorance of the law as to its binding force, Chan. will relieve against it. —

2 Pow. 163. A promise made by one, of whose critical & unfortunate situation, advantage is taken, to procure the contract, is not binding.

A promise to pay a note, by the promisor when it is out-lawed, is not binding; if the promisor is ignorant of his legal right to refuse payment. Quere as to this rule.

Bun. 2670. & 675.

Ignorance of the law, appears to be the only ground for setting aside contracts in these cases; but no definite rule seems to be established for determining in what cases ignorance of law shall have this effect. —

2 Pow. 263.

Ignorance of fact fraudulently imposed, is always reason sufficient for setting aside a contract. —

2 Pow. 126

If a misrepresentation be made respecting the true state of the property, from ignorance, & not from fraud, the rule respecting the contract which the misrepresentation has effected is this; "If the contract would not otherwise have

2 Pow. 127.

been made, it may be wholly set aside; but if the contract would have been made, tho there had been no misrepresentation, it must stand.—

1 Pow. 150. In some instances the intention of the parties as to the nature of their assent will be implied from circumstances, as from the price, and the like. Thus if a man sell a horse for a sound price, the contract will be void unless the horse was sound.— this cannot be law says M. J. But in the case of a Bill of Exch. Ld Kenyon was of opinion that if the holder sent it to market without endorsing his name upon it; Neither morality or the laws of Eng would compel him to refund the money for which he had sold it, if he did not know at the time that it was not a good bill.—

3 Term 757. 759.* 3 Bl. --

It is a general rule of law, that in express contracts, if the thing stipulated for is not delivered, its value at the time that the contract is to be performed, is the rule of damages, in an action at law for non-performance.—

1 Fonb. 224, 225, 6.

Any contract naturally impossible to be performed (except a bond with an impossible condition of which hereafter) is void, if money paid to induce a performance of it, may be recovered back in an action of Indebitatus Assp. But if the impossibility of performance arises merely from the peculiar circumstances of the party undertaking, an action lies to recover damages for non-performance.—

8 Browns R. 6a. 177.

But in some cases where it is impossible for the party stipulating, to fulfil his engagement, or where thro' want of acquaintance in science he is ignorant of the value of what he promises to perform, as in the barley corn case, courts of law have made the value of the article sold, the rule of damages. — The propriety of such a decision may be doubted; for by establishing such a rule of damages the courts evidently make a contract which the parties never intended or contemplated. Besides as fraud or undue ~~influence~~ advantage is very apparent in cases of this kind, it would seem that the contract need not be established at all. —

D. Ray 1664.
6 Mod. 305.

It is generally true that a promise to do one of two things, in the alternative, leaves the promisor at liberty to elect which he will perform, unless contrary intention appears. —

Dougl. 14.

A Bond fe with a condition which is idle, frivolous, impossible or illegal, is good, & the condition is void. but in this case if the condition is incorporated with the bond the whole is void. —

1 Salk. 172.
1 Roll. 420
1 H. Bl. 257.
Esp. 186.
Co. Lit. 206.

If a condition become partly impossible by the act of God, or of the law, it ought to be so far performed as possible. 2 H. Bl. 183. Palm. 522.

Co. Lit. 219a
352.
B. & R. 731.
Jones 180.

In Court if the penalty of a Bond appear to be in the nature of assessed damages; Court will not Chancer the bond, otherwise they will; Courts of law are empowered to Chancer by Statute. — Bun. 2225. : 1 Ser. 111. —

2 Sum. 32.
8 da. 126.
1 B. 544.
3 da. 691.
1 H. Bl. 227.
1 Bro. P. Ca. 470

Contracts.

In cases of Bonds for money, it is done, on payment of principle & Interest, or bringing into Court principle interest and Costs.—

1 Pow. 266. 2 H Bl 227. Cowit 206. If an impossible precedent condition be annexed to the grant of an estate, the Estate can never vest.

But if there be an impossible subsequent condition, on performance of which the estate is to be defeated, the Estate vests absolutely.—

1 H Bl 574. 5 Co. 23. 1 Rob. 452. If the act of a stranger be by the terms of contract necessary to the performance of a condition precedent, if he refuse to act, the party bound to performance is not to suffer.—

1 Sum. 628. One party's preventing the performance of a condition, is equivalent to a performance by the other.—

1 Sum. 645. Thus the Deft. preventing the performance of a condition precedent to the Pltfs right of action, is equivalent to performance by the Pltff.—

1 Pow. 164. A contract in order to binding, must be not only naturally possible, but morally so that is, must be lawful.—

1 Sum. 22. 34. 1 Hawk. 103. A promise which the party making has no power to make either in fact, or law, is void.—

1 Fonb. 213. A contract may be unlawful, as being malum in se or malum prohibitum.— 1 Hawk 103.

1 Pow. 182. 196. It may be malum prohibitum, as being first op-

1 H & M 322. posed to some Statute. 2ly as contrary to the wellfare
327. of the community. or 3ly contrary to some maxim of
7 Term 543. law.—
8 do. 89.

A security given, or a promise made, in conse-

D Roy. 156

Burr 2069. quence of a transaction rendered illegal, by positive
2 H & M 379. law, is not of course void. as if one of two partners, on
3 Term 418. a loss sustained by both, in an illegal undertaking,
pay the whole, & take a security from the other for
the payment of part.— See this doctrine disapproved of. 2 Bos & Puller 371.

An engagement to do an unlawful

Cowp. 39.
Cro. E. 199. act, or to pay or to indemnify another for doing it, is void.

A contract made to induce an omission of duty, is void

10 Mod. 159.
Cowp. 341. as being unlawful.— 7 Term 475.—
10 Rep. 101.

A contract made to encourage any un-

1 Pow. 164.
176. 195. lawful act, or omission, is illegal, and void. This rule op-
Hob. 12.
1 Term 56. erates even against strangers, if they collude with and
3 do. 17.
4 do. 466. assist the natives in violating the laws.—

A mere wagering contract affecting the peace of third

7 Term 610.
3 do. 693. persons; tending to introduce indecent evidence, or operating
Cowp. 729.
2 H Bl 43. against sound policy, is in Eng. where wagering contracts are
1 Wils 349.
10 Pow. 18. 23 sustainable, void.— 5 Mod. 375.—

1 Burr 489.
490. But generally wagers are sustainable at Com. law.—
2 do. 70. 71. At Com. law gambling is not illegal. A wager respecting
1 H Bl 309.
10 Pow. 207. the mode of playing an unlawful or illegal game, is void.—
3 Term 693. 35
2 H Bl 46. Quere is not every idle wager void.—

Stra. 739. A contract not to pursue a trade &c is void.—

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1 Pau. 781. 131. Eq. 596. tho' a contract not to pursue a trade in any particular place, if made upon reasonable consideration. — is good. — Palm. 172. 1 Bro. Ch. ca. 419. 1 Mod 27. 85. 130. —

4 Term. 166. Mariage Brocage Bonds tho' good at Law, are void in Equity, as being intrinsically corrupt. — 3 Lev. 411. Fonb 245. 253. 1 Eq. 503. 1 Wils 347. MR. Thus it would be held void at Law in Cont. — In case of a contract with an heir apparent for an Estate in expectancy, if there be great inequality in the terms of the contract, & the money was expended by the heir in dissipation, Chan. will grant relief — But otherwise no relief can be obtained, unless perhaps where the inequality is so great as to afford evidence of fraud. —

2 Pau. 165. & 174. Show. P. ca 76. 2 Pau 31. & 1 Vern 75. 2 do 14. — 1 Dy. W. 310. 3 to 292. 1 Vez. 159.

If an unlawful contract which was not binding, be actually performed, no relief can be had either at Law or in Equity, provided that both parties are equally guilty.

2 Pau. 150.

An infant however may recover by Indeb. Assu. money which he has lost at Gambling — Yet he is clearly particeps criminis. —

And if one party has been induced by necessity, to pay money upon an illegal contract, it may be recovered back in an action of Indeb. Assumt.

Indebt. Assu. however now lies for money which the holder cannot in good conscience retain. —

If a man has received money as hire, for the performance of an unlawful contract; Indeb. Assu. lies to recover it back, if but before the act committed, but not afterwards.

Doug. 455. Cowp. 790.

Contracts made to defraud third persons are illegal and void. 1 Vern 220. 456. 4 Term. 166. —

1 Pau. 184. 2 Ro. 170. & 763.

An illegal transaction by one of two partners, is void as to the other; that is, he is not affected by it, he not being privy or consenting to it.—

By a Statute of Ann contracts
Burr 1077. for money won at play are void. By another Statute ~~money~~
1 Burr 733 ~~bent~~ the securities for money lent at the time & place of play are void.—

If one usurious security be made the con-
Esp. 175. sideration of another, the latter is void.—
Bro. Ch. 20.
1 H. Bl. 482. If one of two contracts is usurious, & they are
Burr. 178. both blended together in one security; & that security is
1094. afterwards avoided, it has been a question whether the good
1 Mod. 69. contract revives. On principle it would seem that the good contract would revive, for such security is considered when
2 Mod. 307. avoided, as void to all intents & purposes ~~as~~ ab initio. It
Salk. 391. cannot even be given in evidence.—

It would be absurd to ascribe to such a security so great efficacy as to merge & annihilate a contract which was originally valid.—

A Bond obtained by
Esp. 175. duress as a security for a contract of a lower nature, does not avoid the principal contract. But if one part of an entire contract is void the whole is void obs. if the
7 T.R. 201 contract is made in pursuance of a Statute, or
Esp. 90. founded thereon— but if it is a contract entered
Doe 14 into at Com. Law & part of it is avoided, the
2 W.Bl. 351 rest will remain good, tho' the contract is entire.—

Contracts.

1 Bro. 149 If divers considerations be alledged, & some of them be
848.
1 Ld. 48. frivolous & void, or insufficient in matter or form, yet if
any of them be good the Plaintiff may recover. But if one
1 do. 199. of the considerations be not simply frivolous or void, but
2 do.
2 Wils. 135 illegal or immoral this completely vitiates the promise
Burr. 934. If part of a promise, or one of the things undertaken be
illegal, it vitiates the whole. T. Jones. 84

Contracts.

Lex Loci.

1 Burr. 1094.
7 Term 241.

It is a general rule that when a contract is entered into in a foreign country, courts will support it agreeably to the laws of the country where it was made.

But if a contract be made to be performed at home, if it is contrary to the laws then existing. Courts will not support it. So if the contract be to do a thing malum in se, courts will not carry it into execution, tho' it be agreeable to the laws of the country where it was made.

2 Term. 52.

If judgment be had, the interest of the country where it was rendered is to be allowed on the judgment in case of delay.

Burr. 1094

It is a general rule that a person is to be tried & punished for a crime in the State where the crime is committed. But if any person has received a private injury in consequence of the commission of a crime, he may have an action to recover damages against the person injuring in any State; the action being transitory. And if double damages are given in the State where the injury is sustained, that will be the rule of damages in the State where the action is brot.

If a person is guilty of a transaction, which is not pass in the State where committed, be prosecuted in a State where it would not be considered, yet the law of the State where the act was done will govern. If

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a contract is made in one State to be performed in another, the place of performance will govern. –

Lands must be conveyed according to the laws of the State where the lands lie. –

Usury

4 Bl. Usury is ~~the~~ an unlawful contract upon loan of money, to receive the same with exorbitant interest. –

1 Comb. 226. 234. By the Eng. Statute of Usury, any contract by which more than five pr. cent is reserved for the loan of money, is absolutely void, & in addition to the loan of

Pow. on Ms. 421. more than five pr. cent received, its whole value is forfeited, & may be recovered in an action popular. –

Doug. 223. Burr. 2253 2 Term 241. 3 do. 539. 7 do. 184. 3 Wils. 250. 2 Mod. 307. An illegal receiving subjects to the penalties of the Statute, an illegal reservation makes the contract void, but an illegal reservation does not incur the penalties of the Stat. nor does an illegal receiving affect the contract. – The penalty of the Stat. is incurred on the receipt of all pecuniary int. x. 2 Wils. 252.

If upon a contract for the Loan

of £100, & £3 be reserved at the time, and an obligation for £100 with legal interest, too much is reserved, & the contract is void.—

2 Lev. 393 205.

A contract good at first cannot be made usurious by matter ex post facto.—

Bulls 17.

Courts of Equity in considering usurious contracts aside from the rules of positive law, expunge only the excess over legal interest, & allow the lender to recover in the same manner as tho' the contract had been originally legal.— This rule obtains where the obligor brings a bill to have the security delivered up, & not where the obligee is Plff.

1 Ford. 22. 235.

A parol contract to take more than legal interest made at the time of the execution of the Bond, reserving in the Bond only legal interest avoids the Bond.— If several are bound in a usurious contract & one pays the whole he cannot recover in an action for a contribution of the others

1 Salk 22.

A separate note given to secure usurious interest, is not only void itself, but renders the principal contract void.

1 Batt. 218. Bro. J. 508.

Any shift or contrivance by which more than legal interest is reserved, makes void the contract.—

Pow. 1 12: 671. 2 Term 233. or 238.

When the object in view between the parties is a sale merely, no excess of price, nor any some taken for forbearance will render the transaction usurious

1 Ford. 233 Comp. 114. 2 Term 238. 3 do. 531. 1 Batt. 301. 1 do. 351.

But if sale be colourable only, & the real object be a loan — exorbitance in price or an exorbitant sum

allowed for forbearance will render the contract usurious, as well as if there had been a direct lending in the first instance.—

To make a contract usurious it is necessary that it be corrupt, for no mistake of what ever kind will render ~~the~~ it usurious. And whenever there has been a mistake which wears the appearance of usury, the Plff. in his replication to a plea of usury, may set forth circumstances to prove that there was no intention to ~~had~~ take more than lawful interest.—

2 Vent 83. Cro J. 677. Cro C. 501. 1 H & H 277.

If in an action on a usurious contract, the Plff. fails in the manner in which he charges the usury, the Deft. must prevail.—

3 Term 538. 2 Show. 329.

In Assumpsit usury must be given in evidence under the general issue, in case of a penalty it must be pleaded.—

The Supr. Ct. of this State have established a rule for the computation of interest.— See Kirby. The ~~former~~ federal Court have adopted the former part of this rule, of the Supr. Ct. in all cases.—

The casting of Interest is different from that adopted by the Courts of law, with no intent to evade the Statute, does not constitute usury. And it is now settled that the receiving of money for interest before the end of the year is not usurious, tho. somewhat more than the legal interest is in this way retained.—

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When according to the terms of the contract there is an actual & bona fide risque or hazard and of the principal a reservation of more than legal interest is not usurious — as in the case of annuities for lives &c. On the ground of an actual risque of the principal, the lending of a loan to be returned in 3 years with another loan is not usurious. —

1 Show 8. Cro J. 308. Cro E. 43. 3 Wils 390. 1 Fonb. 231. or 331, 6. 4 Term 355. Moor. 398.

But there must be an actual lending and a real risque run, or the contract is usurious. —

The hazard in these cases must be real, and not merely colourable, tho' in many cases it may not be easy to distinguish the pretence from the reality. —

Cro Cl. 642. 741. 5 Term 95. Coutt. 68.

Any attempt to evade the Stat. by ingenuity, artifice &c, will bring a person within it. — Cro E. 28. 1 Show. 8.

1 Fonb. 231. 1 Fonb. 282. or 232. Burr 704.

An increase of interest in the nature of a penalty, for not paying the principal at the time appointed, is not considered usurious.

1 H Bl 227 Cowp. 112. 1 Fonb 231.

It is however usurious, if merely colourable to evade the Stat. The obligor having it in his power to avoid the additional interest by punctuality, is the reason why the rule bank makes it not usurious; yet only lawful interest is recoverable. —

3 Term 534. 2 Lud. 8. 4 Bar 54. Hob. 72. Sha. 498.

Usury must be pleaded to an action on a usurious bond, but not in the case of simple contract

7 Term 53. Burr 1077. 1094.

If a contract be made & to be performed in a foreign country in which the contract is made, their laws respecting interest are allowable. Espica. ob. 289. 3 Bl.

Fonb 638. 2 H Bl 402. 353. 408. 5 Ing. 1900. 385.

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It is presumed that if a contract were made in one County, & the security for it made in another, the interest of the county in which the contract was made, might be reserved in the security. Quere as to this; especially if the original contract was intended to be performed in this case in the latter County.

Lep. Merc. 414.

If both parties for the purpose of avoiding the Statute, should go into a foreign State, & there execute a contract for the loan of money, such a contract it is presumed be governed by the laws of that State where the parties belonged.

2 H. Bl. 147. 412. Burr. 1080. B. N. P. 114. Co. Lit. 79. 80

There is also an analogy between this case, & that of a marriage celebrated in a foreign County, between persons who go there to evade the laws of their own County.

Compound interest is not considered as usurious, but from principles of policy, Courts will not allow more than simple interest to be reserved upon a contract reserving compound interest. But if compound interest be actually paid, or if a separate security be taken, making principal of the interest which has accrued, Courts consider payment or security as legal.

4 Dein. 613 616.

But when the lender profiting by the embarrassed situation of the borrower, takes compound interest as a condition of forbearance, Courts of Chancery will grant relief.

If a sum not greater than compound interest ~~be~~ but more than simple interest be reserved,

not as interest, but for the forbearance, the contract is usurious.—

If one usurious contract be made the consideration of another, the latter is void. but a corrupt agreement to which the Plff. was not privy, shall not injure him, thus: where one note was taken in satisfaction of two others, one of which was usurious, it was adjudged by the Supr. Court of this State, that as the Plff. was not privy, the last note in his hands was good, if the original note was purged by the subsequent transaction.— Quere is this decision consistent with the established principles of law.?

3 Burr 531.
6 do 410.
6 Cro J. 33
Burr 2069.
Cyl. 67.
Com. 4.
ante.

It is an established rule of law, that interest on liquidated sums, tho not expressly reserved, is payable from the time of payment.—

Burr 1086.
2 Burr 53
7 do 124

If no time of payment be fixed upon, it accrues from the date of the security.—

A loan of stock, or of money produced by the sale of stock, on an agreement, that the borrower shall replace the stock, or pay the money with such interest as the stock would have produced, is not usurious, tho. the interest exceed the legal rate of interest, & tho. the money was to be repaid on a day subsequent to that on which the stock was to be replaced.—

3 Burr 531.

A plea of usury must set forth the principal sum borrowed, and the sum reserved for interest.—

3 Burr 538. or 588.
2 Sha 329.

Proving a corrupt agreement for more than lawful, but that the Plff. received more than lawful interest

is not sufficient. —

A special verdict finding an agreement
Cro Ja. 508. to pay more than lawful interest, but not finding that it was corruptly agreed, enables the Court to give Judgment for the Deft.

If both principal & interest are put in hazard
ante. and it is not usury. — If an Ex. pay an usurious contract
Brownl 33 it is a devastavit
Hob. 167.

Contracts void on account of Fraud.

2 Sem 438. 4 do 166. Fraud in the execution of a contract renders it absolutely void. — 2 Bac. 594. Infra 190.

And non assu. & non est factum may
Bun 391. 396. be pleaded to such a contract. But if the fraud be in
474. 460. 482. the consideration, the contract is good at law, nor is
2 Bac. 149. it strictly speaking void in equity, tho. Chan. in some
Dang. 434. 450. cases of this kind relieve against the fraud, as hereafter mentioned, but tho. contracts of this description are good at law, yet the party injured may obtain legal redress by an action for damages. The reason assigned for this distinction, between fraud in the execution, & fraud in the consideration, is, that in the former case, the party imposed upon does not in contemplation of law assent to the contract, but that in the latter he does. But it seems to me that the assent is virtually wanted in both cases. The real ground of distinction I apprehend to be this;

that when the fraud is confined to the consideration, it would be impossible in many cases to determine from the terms of the contract whether fraud had been practiced or not. But as to fraud in the execution the line of distinction is obvious. –

Courts of law have lately shewn a disposition
3 Sum 438. to set aside contracts for fraud in the consideration.
a. 433 When there is a particular fraud in the consideration of a contract, if the legal remedy will not be effectual, as if the party who has practiced the fraud is unable to respond the damages recoverable at law, equity will grant relief. – not indeed by annulling the contract, but usually by offsetting the damages, which might be recovered at law against the contract, or by shifting such ballance as justice requires; or in other words by annulling the contract on condition of the obligor paying what is justly due. But the party applying for remedy in cases of this kind, must shew the insufficiency of the legal remedy. –

If a contract be set aside for fraud in the execution, still the party who has practiced the fraud, may sue upon the bona fide contract, originally agreed upon between the parties, if remedy at law, yet equity would not in this case decree a specific execution of the contract in his favor, because he has not acted an honest part thro' the whole transaction.

When there is fraud

in the execution of a contract, the party imposed upon not having paid, cannot recover damages for the fraud, for before damages are sustained by payment, he cannot have suffered. But by filing a Bill in Chan. he may compel the party to surrender the obligation.

It is a general rule that equity cannot relieve, when an adequate remedy can be had at law. By an adequate remedy is meant, one which will effectually answer the demands of Justice, and if such remedy is not afforded by law, or cannot be obtained without great expence & uncertainty, Chancery will interfere & grant relief.—

When on a contract of the kind last mentioned, one has paid money, he may in disaffirmance of the contract recover what he had paid, in an action for money had & received; or in an action for damages in affirmance of the contract.—

But if the property parted with in this case, be any other than money, the latter remedy only can be obtained, for an action for money had & received lies for the recovery of no property, but money itself.—

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Actions of Fraud

Ans. J. 474. The action of fraud lies as soon as the fraud or the falsity of the covenant is discovered.—

Sum 581. This action lies in all cases of fraud D Ray. 543
1 Com. 166. 2 Bac 594. Esp. 629.

I. It lies upon a warranty, when one falsely warrants property sold as being his own, or as being good in its kind.

II. It lies on the false affirmation, when the vendor of property affirms that it possesses qualities which it does not.—

III. When the vendor of property conceals private defects unknown to the vendee.

In case of an express warranty it is
Doug 20. Lomb. 109. not necessary, to entitle the vendee to damages, to show that
110: 373. the vendor knew the warranty to be false, it is sufficient
1 Mb Bb 17: that the warranty prove false.—
Esp 629.
Sel. 2 0:

If a warranty prove false at the time of making it,
1 Mb Bb. 17. the vendee may support an action without either returning the property, or giving the vendor notice of the unsoundness &c.

Where there is an express warranty Cf Sec.
Doug 20. well lie. See Doctrine of implied warranty 2 East R. 313.

That an action may be maintained on the war-
Sta 417. ranty, it is necessary that the warranty be made at the time of the sale, tho if it be made at a different time, that is suppose a time previous to the sale, an action

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of fraud will lie on the false affirmation.

Dang 20. Quere: is not the action for false affirmation founded on tort, & the action for false warranty on contract.-

3 Term 36. 1 Com 156. In an action for false affirmation, notice it is said must be stated. - 1 Doub 110. Ro. N.P. 30. Dang 632. -

Esp. No action for warranty will lie when the vendor warrants qualities which it is apparent to every one that the property does not possess.-

1 Term 745. 2 Kb 17. 19. If the purchaser of unsound property, which was warranted, sell it, after the vendor has refused to take it back, still the former may sue on the warranty.-

Esp 629. 632. Any imposition appearing to be an express fraud, will lay a foundation for an action of fraud, even tho' the vendor said

Rob 5. 26 27. nothing to deceive the vendee. Concealing defects amounts to a warranty.-

If an express warranty be accompanied with an agreement by the vendor, to take back the

2 Kb 565-73 goods, if on trial they are found defective, the buyer must return the goods as soon as he has discovered the defect, in order to maintain his action on the warranty.-

3 Term 759. Poph 143. 2 East R. 313 If one purchase property of no value at all, the vendor not knowing the defect, but being entirely honest in making the contract, it is doubtful whether any action for damages can be maintained by the vendee. An action for fraud certainly cannot. But it is now settled that damages may be recovered.-

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Whenever one sells property to another, the law
1 Comb. 109. 373. carries an implied warranty on the part of the vendor, that the property is his.—

When one buys on this implied
Carth. 90. 3 Term 57. 60. 59. warranty, property which the vendor did not own, the
Cro. J. 41. Salk. 210. 10 Mod. 42. 1 Keb. 523. vendee in bringing his action for damages must according to some authorities state scienter in the vendor if in other he need not.— Cro. C. 472. 1 Sid. 146. Show. 68.

According to an authority in Cro. James, a false affirmation of qualities which the articles sold do not possess, is
Cro. J. 469. no ground for an action for damages, but this authority seems to be overruled.—

An affirmation is a warranty in law, if it was
3 Term 57. so intended.—

Salk. 211. A mere opinion given by the vendor respecting the
Yelv. 20. Salk. 211. property sold, lays no foundation for an action of fraud.— As if ~~one~~ A says "one person is worth a £100". But if he
Ray. 1118. should say I rented my farm for five pounds last year to Tom Brace, when in truth the rent was but two pounds,
B. N. P. 31. if thus induced the vendee to purchase, an action of fraud will lie, for in the latter case the vendor evidently affirms, that his property possesses qualities ~~that~~ which it does not.—

It has been adjudged that a false affirmation of qualities in
3 Term 51. property sold, tho made by a person not interested in the contract, is a sufficient ground for an action of fraud.

It is laid down as a rule of law that unreason-
2 P. W. 203. 1 Ds. 3 Dr.

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Gilb. Ca. 41. Salk. 449. 14 Ven. 466. 2 Burrow 62. 167. 2 Pow. 143. 152; 158. 200. 228.

ableness alone in a contract, is not sufficient to warrant the interference of Chancery; but that if the unreasonableness be such as to afford evidence of fraud, Chancery can relieve. — Mr Reeve however supposes, that unreasonableness alone is sufficient for the interposition of Chancery. Quere. —

The undue advantage taken of ones situation, undoubtedly founds a claim for relief in Chancery. —

3 Term 551. 4 do 166. 1 Ven 348. 475. 2 Ves. 375. 2 P. W. 169. 176.

Contracts operating as frauds or impositions on third persons, are totally void, even as to the contracting parties themselves — Salk. 156. 1 P. W. 496. 3 do 75. note.

3 P. W. 292. 2 Ves. 159. 2 Pow. 163.

Fraudulent contracts not affecting third persons, may be ratified by a subsequent agreement; for if the party originally cheated will when acquainted with his ~~to~~ rights of when under no restraint confirm a disadvantageous contract, it must be charged to his own folly. —

2 Pow. 176. 1 Ven. 475. 476. 1 P. W. 496. 2 Ven. 764. 3 P. W. 75.

But agreements in fraud of third persons, is a such wherein there is actual fraud, cannot be rendered binding by a subsequent promise or ratification, even of the parties to them, as agreements fraudulent in the eye of a Court of Equity, as imposing hardship on one party, may; for the original contract being actually fraudulent in the sense of deceit no subsequent act can purge it of that quality. —

1 P. W. 496. 3 Ver. 522. Ehyd.

Marriage Brocage bonds, & fraudulent bonds in general, gain no validity by assignment. Quere. how is the law respecting negotiable securities. — Answer. It is

now decided that negotiable securities are valid by assignment, except where the Statute says expressly that they shall be void "to all intents & purposes."—

Contracts for the expectancies of young heirs, are considered in Equity as intrinsically corrupt, tho' it was formerly the practice to enquire into the fairness of the contract.—

1 Ven. 167.
2 do 14.
1 P.W. 310.

Yet such contracts may be ratified, notwithstanding, by the heir, after he comes into possession of the estate, & if at the time of making the ratification he understood his right, and no advantage was taken of his situation he will be bound

1 P.W. 118.
3 do 192
2 Vez. 159.
2 Ver. 182.

If however at the time of ratifying the contract the Heir did not act freely, or were ignorant of his rights, he is not bound by his ratification —

3 P.W. 320.

A contract perfectly negatory is void, & if money has been paid upon such contract, it may be recovered back as having been paid without consideration.—

Contracts.

Contracts obtained by duress.

All contracts or securities obtained by duress may be avoided by pleading the duress specially.—

Duress is of two kinds, Duress by imprisonment & Duress per minas.—

A contract entered into by a man unlawfully imprisoned, may be avoided.—

But if a man by due course of law arrested, & imprisoned, on mean process, which was apparently groundless, & gives a Bond to procure a discharge from prision; it seems that such a Bond tho' improperly obtained, and voidable in Chancery, is not voidable at law, on the ground of duress, for the process of imprisionment is strictly speaking legal.—

1 Lev. 68. Holt. 266.

Threats to destroy property or commit a Battery, not amounting to Mayhem, do not constitute duress so as to avoid a contract.— This rule is questioned.

1 Bl. 10 Mod. 202 9 Ch. 317.

It has been considered as a rule, that duress to render a contract voidable, must be imposed upon the person himself who enters into the contract.

But duress imposed on a wife may render a contract void, entered into by the husband, by being specially pleaded, & vice versa. The reason which Finch assigns ~~as this rule~~ in support of this rule, is that the

Cro. J. 187.

Husband & wife being but one person, of course when the wife is imprisoned, or otherwise put under duress, the husband is also personally imprisoned. –

In some cases also Duress imposed on a Son & Daughter, or other near relative, has been adjudged sufficient to avoid a contract. –

Sid. 123.
2 Roy 327.

But as to this point authorities are contradictory. – Duress must be pleaded specially, in order to avoid a specialty, & cannot be given in evidence under the general issue of non est factum, tho' under non assumpsit it may.

5 Rep 119

In case of undue influence, tho' not amounting to Duress, Chancery will rescind the contract, but it is otherwise if the contract be reasonable, & the influence such only as arose from due reverence & respect.

2 Ver. 189.
1 Veg. 19.
10 Ath. 11.

The ratification of a contract obtained by duress, must in order to be binding, have been made freely & without any undue practice. –

Contracts.

Contracts required to be written.

1 Bar 72. 1 Pow. 269. The common law distinction between special & simple contracts is explained under another head. - 3 Bl. -

There is also a distinction between written & unwritten contracts, introduced in certain cases by the Statute of Frauds & Perjuries enacted 29th Car. 2d. -

1 Pow. 270. 1 Bar 72. 3 Bl. - Under the Statute of Frauds & Perjuries the following contracts or agreements will not support an action or suit in Law or Equity, unless the contract or agreement be in writing, signed by the party to be charged, or by some other person, by him thereunto legally authorized.

I. A promise by an Adm^r. or Ex^r. to answer out of his own Estate for any debt or duty of his testator, or intestate, that is such a promise not in writing, does not bind him in his private capacity. -

II. Whereby to charge the Deft. upon any special promise to answer for the debt, default, or miscarriage of another person. -

III. Promises upon consideration of Marriage.

IV. Sales of Lands, tenements, hereditaments, or any contract for any interest in or concerning them. -

V. Contracts not to be performed in one year from the time of making them. -

There is a clause in the Statute relating to contracts for the sale of goods &c of the value of £10. which is not material in this Country. -

By the Eng. Stat. all parol sales or leases of lands, tenements, or hereditaments or of any interest in or concerning them, it was formerly holden operated as leases or estates at will only, except leases for a term not exceeding 34 years, reserving as rent two thirds of the improved value, but it has lately been determined that such leases enure as tenancies from year to year.—

By the Stat. 2 Geo. 2 an action of Indeb. Assumpsit lies on a parol demise.—

Esp. 20.

The object of the Stat. of Frauds & Perjuries was to prevent persons from proving agreements of the above description, by parol evidence, it being supposed that there was danger of fraud & perjury in doing it.—

Qualifications of the foregoing rules.

Promises by Exrs. and Administrators

Roy. 126. Cowp. 284. or. 234.

If the Exr. or Admr. have assets sufficient to answer for the debts or duties of the testator or intestate, his parol promise shall bind him.

Assets constitute a consideration advantageous to himself, so as to transfer the duty to him personally.—

Gro. Ch. 91.

But proof of sufficiency, will not arise in implied promises to charge the Exr. de personally, tho' a contrary opinion was advanced by Ld Kenyon.—

5 Term 690. Cowp. 288.

The administrator submitting a

claim against him to arbitrement, was once holden obiter to be admission of sufficient assets. But this opinion is now properly overruled, for the admr. may be desirous of ascertaining the existence or amount of claims, without knowing whether he has assets.—

7 Term 453.

But if on such submission the arbitrators award that the admr. shall pay a certain sum, he cannot afterwards deny assets to that amount against the Creditor; indeed the award is equivalent to the finding of assets to that amount.—

The same rules hold as to Exrs.— It was once holden that payment of Interest was an admission of assets by the Exr. to the amount of the principal, or rather the onus probandi is thrown on the Exr.

But this rule was plainly unreasonable, for if there be not assets it would be hard because the Exr. had paid a part out of his own pocket, he should therefore be liable to pay the whole. It has been overruled by later authorities

5 Term. 8.

Tho the promise by the Exr. be in writing, he is not bound unless some sufficient consideration be proved. The promise is a simple contract only— The object of the Stat. is not to make the Exr. liable at all events when the promise is in writing, but only in those cases which before the Stat.— he would be bound on a parol promise.

7 Term 350.

II. Promises by one to another for the debt of another.

Under this clause of the Stat. this general distinction is to be taken.

Contracts.

D Ray. 1087. If the promise made for the benefit of another be original
Comp. 227. it is binding, tho' by parol, but if it be collateral, it is not
1 Wils 306. binding. — Bacon. 1888.
Esp. 101, 2

A promise is said to be original, first, when the third person, for whose benefit it is made is not liable at all to the promisee, so that there is no debt fix on his part. — And secondly, where his liability is extinguished on the promise being made, such a promise is out of the statute. —

But where the promise is made in aid of a
5 Mod. 205. subsisting or continuing liability on the part of such third per-
1 Wils. 306. son, or to procure credit for him, that is, when the promise
2 do 94. is intended to furnish an additional remedy, it is collateral
D Ray. 1085, 6
Salk. 27. & within the Statute. —
Esp. 101 2.

The above distinction is supported by
2 Term 81.
1 H. Bl. 120. the current of authorities. Thus if A. say to a Merchant, "de-
D Ray. 1087. liver goods to Tom Brace, & charge them to me" or "deliver them on my account" or "deliver them I shall pay you" The promise is original; for Tom Brace is not liable at all, A. is the original debtor. — But if I say "deliver goods to Tom
Comp. 227. Brace & if he dont pay you I will" it is collateral, hence
1 H. Bl. 120. the intent is that the charge should be in the first in-
D Ray. 1386. stance against the receiver. — Esp. 102. —
or 1886.
Salk. 28.

So where it was said, supply my Mother in Law
Salk. 282. with bread, & I will see you paid, the promise was holden
2 Term. 80, 1 to be collateral. Because of the intent as in the last case, that the receiver should be liable in the first place.

Contracts.

L. Mansfield once held that such a promise before the delivery of the property, was original, there ~~being~~ being then no liability on third persons. But this opinion is overruled.

Cowp 228 229.

So if one said, if you dont know J. B. you know me & I will see you paid, the promise was holden to be collateral, J. B being first to be charged.

2 Sem. 80 or. 30.

So a promise by me, that in consideration of your letting a horse to J. B. he shall redeliver him, is collateral. This is undertaking to answer for the default of another to procure his credit.

1 Salk. 27. 3 Ld. 15. 6 Mod. 148. 2 Ray. 1085. Hob. 606. 1 Bac. 756.

And it may be laid down as a general rule, that a promise that a third person shall do an act, for not doing which he would be liable, is collateral.

2 Ray. 1038. or. 88.

A promise in consideration that the promisee will extinguish a debt against a third person, is original, if not being in aid of a continuing liability in the third person, or to obtain credit for him, as ~~one~~ when one said burn J. Thoreats bond & I will see you paid.

2 East R. 324 3 Esp. R. 86

So in ~~Burrow~~ Williams vs Leiper, when the Landlord came to distrain J. B's goods for rent, the Deft. to whom they had been assigned promised to pay the rent, if the Pltf. would not distrain, the promise was holden good, tho' the tenant J. B. remained liable.

Burr 1886. 2 East R. 324 3 Esp. R. 86

The Pltf. had a lien which he gave up in favor of the Deft. on his promise to pay.

A promise to pay a certain ~~sum~~ sum in consideration
7 Term. 204. of the Pltfs withdrawing a suit agst. J.B. for assault &
1 Wils. 94. Battery was holden original. There no debt was from J.B
if it did not appear that there was any fr in him.

2 Wils. 94. But a promise to pay in consideration of the promisee's
Burr. 1887. staying a suit brot. agst. J.B. for debt is collateral, for the
7 Term. 201. debt still subsisted agst. J.B. if no lien is taken away.
2 H. Bl. 312. Yet if this promise had been in consideration of the
promisee's withdrawing, it is a question whethe it would
3 Bl. be good or not, since a detraxit disables the Pltff.
from bringing another suit, so that J B's liability
is extinguished. —

A promise to pay A B's debt of the
Pltff. would release A B taken on mesne process, is col-
lateral I apprehend, for the debt continues, And A.B.
may be arrested again. Yet if ~~the~~ A.B. should in this
case escape, so that the Sheriff could not retake him,
the promise would be binding. —

Yet this rule would not hold I conclude, if A.B.
Burr. 2482. had been taken on final process, & thus released, for in
1 Term 357. this case releasing would discharge the debt. —
6 do. 526.
7 do. 421.

Some have suppose that when there arose a new con-
sideration, a promise to answer for the debt fr of another is
good. L Mansfield once held this opinion, but afterwards
Burr. 1887. acknowledged it to be erroneous. It certainly it is not Law,
Doug. R. 128. for as the original promise continues or rather cause of action
the promise is collateral. Mr. Reeve maintains that if such

2 Esp R. 475. 1 Bos & Pullen 24.

promises be out of the Statute, almost every parol promise to answer for the debt of another, would be established if that the provisions of that part of the Sta would be abolished.—

A written promise to pay the debt of another, if he do not, is discharged by the Promisees granting forbearance to the debtor, for by this act the Promisee makes a new contract with the debtor, of course takes the issue upon himself.—

When according to the above rule

Roy. 450. B.N.P. 279. 1 Bar 75. Bur 1890.

the promise must be binding only when they are written, it is not necessary in declaring, to aver that it is in writing it is sufficient if it appear in evidence.—

12 Mod. 540. 4 Bar 655.

This rule holds as to all contracts contemplated by the Statute.— B.N.P. 279. Roy. 450.—

But if the promise be pleaded in bar of another action, it must be shown, or averred to be in writing, for in order to be an effectual bar, it must be such a contract as will support an action.—

Sewm 201. & 204. 2 Esp R. 475. 1 Bos & Pul. 24

A parol contract to pay the debt of another if also to do some other thing, is void in toto, because if one part of an entire contract be void the whole is also void.—

The Statute of Frauds requiring to answer for the default of another to be in writing; requires the consideration of the agreement to be in writing also.— 5 East. Rep. 10. & parol evidence cannot be admitted to supply the omission

III. Agreements in consideration of marriage

B.N.P. 280. This clause of the Stat. relates not to promises to marry.-
1 Fonb. 179. These are good by parol. It relates only to agreements in con-
1 Pow. 277 & 278 sideration of marriage, ie such as are in contemplation of
1 P.W. 618. marriage, by way of marriage settlements, or family pro-
Ree. Ch. 526 vision: These to bind must be written.—

There are no exceptions to this rule, except in cases of part performance, of which hereafter.—

It was formerly doubted whether a parol agreement
1 Pow. 279. 281. would not be good if it should stipulate that it should be re-
1 Ch. ca 135. duced to writing, but such stipulation it seems makes
Ree. Ch. 402. no difference, at least does not take the case out of the
3 Atk. 504. Stat.—

A letter signed by one party is a writing within
1 Fonb. 179. the Stat. 1 Brown. Ch. 504: 1 Ver. 202: 2 do 322: 3 Brown Ch 318.
1 Pow. 287. 288.

But it must appear that the other party accepted the terms
1 Fonb. 179. contained in the letter & acted in contemplation of them
1 Pow. 287. or 237. in proceeding to marry, otherwise they are not binding:
2 P.W. 65 thus: when the party to whom the letter was sent, was igno-
1 Pow. 270. 9 Mod. 3. rant of the promise in it, at the time of the marriage,
performance was not decreed.—

So when A wrote a letter to his daughter containing
1 Fonb. 193. a promise of a settlement on her intended husband, which
was not shewn to the latter

In these cases there is no agreement, the minds of the
1 Fonb. 179. parties have never met.— 10 Ch. 560. Sha 426. 10 Atk 12.

A letter also in order to be a sufficient agreement must furnish distinctly the terms of the agreement, or it must at least refer to some written agreement or instrument in which the terms are set forth.

10 Ch. 12.

IV. Contracts for the sale of Lands &c.

It was formerly doubted as under the last head, whether a parol contract would not bind if it were part of the agreement that it should be written. — 1 Eq. ca. 19.

1 Pow. 279. 283. 1 Ven. 157. 159.

But it is now settled that this makes no difference

1 P. W. 770. 1 Ven. 224. 5 Ch. 402. 6 Browns. Pa. cas. 49. 2 Bro. Ch. 535.

It was once decided in Connecticut, that a parol agreement by the grantor at the time of the granting, to pay for ~~the~~ a deficiency in the supposed contract, was within the Stat. But a contrary decision has since been had & reversed in the Supreme Court of Errors. — It is considered not within the Stat. in Mass. —

Thirly 2-2

Sup. Court 1800.

The nature of such agreements are good under the Statute, if they are provable ~~under~~ consistently with the spirit of the act & the rules of evidence. —

There is no inherent inability in a parol contract, the difficulty lies in the proof. — The Statute merely introduces a new rule of evidence to prevent frauds and perjuries. —

It is a rule of construction, that Statutes like these against ~~these~~ frauds are to be liberally construed, that is, they are to be so expounded when they act upon the

6 C. R. 601

1 Ca. 271. 292. 1 Ca. 22 n. d.

offence by setting aside the transaction. — 1 Veg. 441. P. Ch. 208. 374.

2 Atk. 100. 155. 1st. When there is no danger of fraud or perjury in enforcing
3 Ac. 3. — Bl. Re. 600. the agreement, the case is not within the spirit of the act. Thus,
Bro. Ch. 568. Amb. 586. on filing a Bill for specific performance, if the Deft. in his
1 Ver. 292. answer confesses the agreement, it is binding, for there is
no danger of fraud in acting on such proof. —

It is a question as to the example put, whether
1 P. Ch. 208. the Deft. tho. he admits the agreement, if he insists on the
Stat. by plea, the agreement can be enforced. —

In Atkins it is laid down that Chancery would
3 Atk. 3. dence it, tho. the Deft. had insisted on not performing it —
In the case in the second Atkins the Deft. did insist
2 Atk. 156. on the Stat. by pleading; yet he having confessed the
2 Bro. Ch. — 568 plea in his answer, the plea was overruled & the agree-
ment decreed. —

In Black. Rep. the rule is laid down gener-
Bl. R. 600 ally that an agreement confessed is out of the Stat. — A con-
trary decision has been had at Law, that is, it has been
decided, that the Deft. having confessed the agreement by
2 H. Bl. 63. answer in Chancery, insists on the Stat. he is not liable
on the agreement. This decision plainly militates agst.
those in Chan. notwithstanding there are weighty opin-
ions to the contrary; for this is altogether a question of
construction, about which the same rules prevail both
2 Bro. Ch. 569. in Chan. & at law. So in Bro. Ch. the plea of the Stat.
6 Bro. P. Ca 48 was allowed, tho. the agreement was confessed, or rather
not denied; but this decision was on the special circumstan-
ces

-ces of the case. The agreement was incomplete; only general heads, by way of illustration or instruction to an Attorney.

Remains therefore questio vexata. If insisting
1 Ford. 170 on the Stat. prevents a remedy on the agreement when confessed,
1 Bro. Ch. 569. the rule itself, that confession on the answer, takes the agreement out of the Stat. seems nugatory, because no agreement can be enforced under it, unless the Deft. is willing it should be.

It is also an unsettled question, whether a Deft. in Chan. on a Bill for specific performance of a parol agreement for the sale of lands, is bound, either to confess or deny it in his answer.

This question was decided by L. Mansfield in the affirmative - that is he was obliged to do
2 Bro. Ch. 566 one or the other.

L. Thurlow was of the same opinion, & held that the only effect of the Stat. as to proof of the
1 Bro. Ch. 567. agreement, was to prevent the Pltff. from proving by
1 Ford. 170 other evidence, as that if the ~~Pltff.~~ Deft. denies it the Pltff. cannot prove it by parol.

L. Loughborough is of a different opinion, because
2 H. Bl. 68. compelling the Deft. to answer a parol agreement, lays him under a temptation to commit perjury.

If he is bound to confess, or deny, it seems to follow that his
1 Ford. 170 1. confession takes the agreement out of the Stat. and that insisting on the Stat. will not avail him.

It has been holden that a party to a parol agreement
1 Paw. 293. for the sale of lands &c. tho' he denies the agreement by answer
3 Atk. 407. shall be bound by it, if a previous confession out of Court can
be proved. — Mr Reeve does not like this rule.

Upon the above principal viz. that there is no danger
1 Paw. 271. of fraud or perjury, a parol contract for the purchase of lands
1 Ch. Ca. 289. 1 Ves. 218. 221. at a vendue sale, before a master, in Chancery, under the
1 Bro. C.C. 334. order of the Court is binding. —

Here the sale is a judicial one, & is proved by the
entry of the Master in Chan. And hence in contemplation
of law, there can be no danger of fraud or perjury, since
full evidence is given by law to the officers of the Court. —

— Again according to the authorities, a parol contract respect-
Paw. M. 65. 3 Wood 429. 2 Ves. 376. ing the an interest in lands &c. if inferable from circum-
3 Atk. 71. 2 Ch. 576. stantial facts, in proving which there is no danger of fraud
Talk. 60. or perjury is binding. — Thus, if there be a sale of lands by ab-
21 Vin. 484. solute deed, but the vendor at the execution, gives obligations
1 P. W. 381. to the vendee, to the exact amount of the consideration, re-
2 do. 549. mains in possession, pays the taxes, does not account for
1 Vent. 105. the rents & profits, & pay interest. From these facts a
trust is implied for the vendor, that is, he is considered
as mortgagee by virtue of an implied parol agreement.

This seems to be a reasonable exception to the
B. C. Re. 600. general rule, for the mode of proof is not inconsistent with
the spirit of the Stat. that is, it does not invite perjury. —

B. C. Re. 600. 2. Y. Other exceptions to the Stat. are admitted on the ground
1 Paw. 294. 296. that an act made to prevent fraud, ought not to receive such

1 Fonb. 171. 172. a construction, as would protect & encourage it.—

So where a party by not performing a parol agreement will practice a greater fraud on the other, than would result from the mere breach of the agreement itself, he is generally holden to it in Chancery.—

1 Fonb. 172. 1 Pow. 296 & 6 B. & C. 600. Therefore a parol agreement performed or partly performed, on one side, at the request or consent of the other, will bind the latter. Thus a lease to B. for 20 years, if B. enters under the lease & begins to build, or incur expence in improvement, the contract will be enforced in Chan. Otherwise the lessor would take advantage of his own fraud.

1 Vez. 83. 297. 221. 1 Vern. 159. 363. 2 do. 373. 619. Atk. 783. 2 Atk. 100. 1 Bro. 74.

In such cases the agreement has been enforced; tho' the terms of it have not been precisely settled by the parties.—

Eq. ca. 1748. 2 Vern. 523. 1 Pow. 297.

Delivering possession of land in performance of a parol agreement, is a sufficient part performance.

1 Pow. 299. 300. 2 Vern. 363. 455. 2 Eq. ca. 48. 1 Bro. P. Ca. 102.

And taking possession under the agreement it seems is deemed sufficient notice to a subsequent purchaser, of the parol agreement will hold against him.—

1 Pow. 302. 1 Vern. 365. 2 do. 363.

So the payment of money under a parol agreement, has been holden such a part performance, as to take the agreement out of the Stat.—

1 Pow. 304, 5. 2 Vern. 523. 3 Atk. 2. 1 Vez. 83. 222. 1 Bro. 64. 1 Fonb. 175.

This rule has been questioned but finally settled by L. Hardwicke.

Two or three cases have, however, been objected

to the rule, where on a parol agreement for a purchase,
1 Ford. 175. of a lease of land, money was paid as earnest. But these
R Ch. 560. cases do not affect the rule, for here the money paid, was
2 Eq. ca. 46. not in part performance of the agreement, or subsequent to
the agreement, but was a mere solemnity in making
the contract, a form in stipulating. —

In this case damages may be recovered at Law for
1 Par. 308. non-performance. —

It has been questioned also whether the
receipt of the money in part performance may be pro-
ved by parol. — If not the rule itself that the payment
of money is sufficient part performance, is idle; for if the
payment cannot be evidenced, without a writing counting
on the agreement, the contract will no longer rest on
parol. —

In one case decided by L. Hardwicke, the payment
Ath. 4. was proved by parol. —

And Powel who treats the rule as
1 Par. 307, 8. questionable, maintains that parol proof of the payment
of money, may be admitted, because the payment is
merely a collateral part.

A parol agreement in part per-
1 Par. 309. formance will be decreed against the heir of the party, in
3 Ath. 2. whose favor the part performance was.
Ford. 300.

But the act claimed to have been done in part per-
1 Par. 309. formance, must in order to take the agreement out of
1 Par. 74. the Statute, be such as in the opinion of the Court would
3 Ath. 4.
R. Ch. 561.

1 Fonb. 175. not have been done, but with a view to perform the
1 Bro. C.C. 402. agreement, otherwise it affords no presumptive evi-
1 Atk. 12. dence of the agreement.—
6 Bro. P.C. 45.

Marriage of itself is not considered
1 Ver. 309. as part performance of a parol contract, ~~in consideration~~
1 Bar. 74. ~~of marriage, for by the terms of such contracts~~ made
8 Ch. 561. between the parties themselves, altho' it is considered
Sha. 738. as such to bind a third person.— The reason why ma-
or 733. riage alone is not considered as an execution on one side ~~is~~ between the parties, so as to take such case out of the Statute, seems to be that if it were, the Stat would be entirely evaded, for all promises of this kind suppose a marriage had or to be had.—

But it is said a parol contract in considera-
1 Ver. 179. 298. 299. 309. tion of marriage, by third persons as a father to one of
2 Ver. 373 the parties, is taken out of the Stat by marriage, it being
1 Fonb. 201. with his consent, otherwise a fraud would be practised on the parties.—

So where the wife was allowed by the husband
1 Ver. 304 during coverture, to receive the Interest of a certain sum of
1 Ch. 297. money, which the husband before marriage agreed to settle to the wife's separate use, the agreement was held binding on the ground of part performance.—

So cutting down timber in performance of a marriage
1 Ver. 304. 2 Ca. 28 agreement, was holden a sufficient part performance.—

2 Atk. 203 Upon the same principle to prevent fraud, even a writ-
3 Ch. 389. ten contract respecting an interest in Lands, or any other sub-

1 Fonb. 188. 1 P.W. 620. ject may be contradicted, by proving the parol agreement. if there was fraud in the execution of the instrument. 1 Eq. ca. 2 a. 1 Pow. 294.

2 Veg. 376. 2 Atk. 203. 3 do. 389. The same may be done in case of a mistake in the execution. 1 Pow. 433. 6 Sam. 671. 1 Fonb. 188. 193. 1 Veg. 475.

Thus if A. agree to settle £1000 on B. & by mistake ~~one~~ £100. is inserted, the parol contract may be proved, for the minds of the parties never met in executing the agreement.

1 Veg. 299. 1 Vern. 240. 1 Pow. 294. So a written agreement respecting an interest in lands may be controlled by a parol one to rebut an equity. An equity is a right merely equitable

To rebut, means to oppose, to combat, & this rule tho' it be a rule of evidence, is peculiar to Equity, for a Court of Law knows nothing of a mere equitable right.

Esp. 20. 165. 8 b. R. 1219. 1 Sam. 378. 1 Wils. 314. By Stat. 11 Geo 2. Indebit. Assump. for use & occupation lies on a parol lease, & the agreement as to the rent may be given in evidence to ascertain the damages. 1 H. Bl. 623 5.

At Com. law Assump.t would not lie for rent tho' debt would.

Esp. 26. 1 Butt. 24.

But in order to sustain the action ~~the~~ of Assump. the Deft. must have occupied with the consent of the Pft.

Esp. 20. 21. 1 Sam. 378. for if the possession have been tortious or adverse, the idea of a promise is excluded.

Contracts

~~Contracts~~ –

Contracts not to be performed within one year from making. –

Under this clause of the Stat. a promise to pay by parol to pay a certain sum of money, or do a certain act two years hence is void. –

It has been holden that this clause of the Stat. does not extend to any agreement concerning lands or tenements, because I suppose the preceding clause had made all the provisions intended to be made as to contracts of this kind. –

I conclude then that a parol agreement of this kind confessed or partly executed is binding. –

1 Ow. 276. 1 Vern. 155. Salk. 280. B. N. P. 280 Sho. 506. Bur. 1278. 2 Ray. 316. 317. 367. Holt. 326. – When the performance is to take place on a contingent event, which may or may not happen within a year, the agreement is not within the Stat. and binding. 3 Salk. 9. Thus a promise to pay a sum of money on the return of a ship or on A's marriage is binding by parol. –

So a promise to leave a sum of money to the promisee by Will, is binding, for in the eye of the law the death of the promisor is such a contingent event as may happen within a year. –

B. N. P. 280. Bur. 1278.

And to make the contract binding there is no need of the contingency's really happening within a year for the contract is good or not at inception.

2 Ray. 317. Bur. 1284.

This clause then extends only to contracts which are

cording to their express terms are not to be performed
Burr. 1281. within a year.—

Rules applying to all or several of the different Contracts contemplated by the Stat.

1 Raw. 370. The construction of this Stat. is the same both in
Bro. R. 600. Equity & at law, tho the remedy or relief may be different
1 Jonb. 22. ~~Also~~ These rules apply to the construction of all Statutes,
3 Bro. 4. for the intention of the Legislature governs both in Equity & at law, & the construction is merely the discovery of that intention.—

A question may arise respecting the import of the word "note
1 Jonb. 179. or memorandum" used in the Stat. I suppose any writing which
1 Raw. 287. 2 Bro. 132. is intended to furnish evidence of the contract is a note or me-
3 do. 318. 1 Ves. 201. morandum within the Stat. for evidently no particular form
3 do. 322. of words is necessary: thus a letter written by one party is a sufficient "note or memorandum."

But such a letter must sufficiently or rather distinctly
1 Jonb. 179. furnish the terms of the agreement, otherwise is not binding—
1 Raw. 290. P. Gh. 560. This rule holds in every case of a writing whether of a letter or of
Sta. 428. 1 Atk. 12. a note.

It must also appear that the other party accepted the
1 Jonb. 179. 2 Ch. 65. terms, & acted upon the offer, otherwise there is no agreement.—
1 Raw. 287 8. 9. 2 Mod. 3
5 Vin. 527. Bro. R. 599. So an advertisement written or printed by one of the parties
Burr. 1921. & containing the terms is a sufficient note for on his part.—

1 Ves. 32. The Stat. also requires that the note be signed by the party
1 Atk. 118. 1 Ves. 6. 3 Atk. 6 13. to be bound & a question then arises as to what is a sufficient signing—

The general rule is, that not only a subscription in the usual form, but the name of the party to be bound, written in any part of the instrument, if intended to give an authenticity to it, is a sufficient signing, provided there be an acceptance by the other party. Thus if the agreement be in this manner I AB Reeve agree with C Edwards to sell to him Blackacre &c. The name of AB Reeve written in the body of the instrument is sufficient.

1 Ves 282. 1 Ford. 167. Esp 23. Sha 399. Day 1376.

But when the name written in the body of the instrument is not sufficient to give authenticity to it, it is not sufficient signing. Thus if A Lowing agreed to lease B. by parol, wrote instructions for drawing the lease in these words: the lease to be received, — & to pay taxes &c. this is no signing by A. for his name was inserted merely to explain the stipulation & not to authenticate the agreement.

1 Ford. 166. 10 W. 776. 1 Ves. 285.

It seems formerly to have been supposed that the party's making alteration with his own hand in the draught of the agreement was sufficient signing, but this opinion is now overruled.

1 Ch. Ca. 221. 1 Ford. 165. 10 W. 770. 1 Ford. 166. 1 Ves. 284.

But signing the writing as a subscribing witness, the signer knowing the contents of it, is a sufficient ~~stipulation~~ signing to bind him to any stipulation recited in the writing on his part.

1 Ch. Ca. 6. 1 Wms 318. 1 Ves. 284.

Thus where marriage articles reciting that the mother of one of the parties had agreed to advance one hundred pounds as a portion &c were signed by her as a witness, she was holden to be bound tho not a party, for the signing was intended to give authenticity to the

articles.—

Again the Stat. requires that the note shall be signed by the party to be bound, or some other person by him thereunto legally authorized. The question then arises who must sign?—

It is sufficient if the party against whom the suit is brot. have signed, tho the other party have not, if he has had evidence in his power of the acquiescence of the other.— Thus if A draw an agreement & procure B, to sign it, tho he does not himself B is bound.

1 Rw. 286.
2 Eq. 373.
1 Eq. ca. 20.

In the last case A is also bound, for procuring B to sign made B's subscription a signing authenticated by A. & a signing procured by one party, is equivalent to a signing by his Agent.—

1 Rw. 287.
Eq. ca. 10.
21.
2 Ch. ca. 164.

So also an auctioneer subscribing the name of the highest bidder, to the conditions of the sale is a sufficient signing for both parties. For in this subscribing, he acts as agent for both parties.—

B. & P. 280.
36 R. 599.
Bum. 1921.
8 Term. 151.

It has indeed been doubted whethe sales at public auction are contemplated by the Stat. at all, the sale being public, so that there can be no danger of fraud & perjury.—

B. & P. 280.
36 R. 600.
Bum. 1921.

If part of an entire contract is within the Statute, the whole is, for an entire contract cannot be severed, since each part is in consideration of some other part, & since therefore if Courts enforce one part only, they would virtually make a new contract.—

7 Term. 201.

Contracts.

Contracts.

Contracts made void by the act of the parties

1 Pow. 413 Before a right of recovery is had, or is attached, the parties may rescind their contracts by mutually expressing their dissent in presence of witnesses.

But after a right of recovery has attached, the contract cannot be rescinded by a mere agreement; there must be a release, acquittance or discharge in writing, or other consideration.

1 Pow. 416. Cro. C. 384. ~~3 Mod. 47.~~ 2 Mod. 259 Story Pled. 128. 2 Bro. P. Ca. 116. 1 Pow. 413. 421.

A waiver of a contract on one ~~side~~ or both sides, may be enforced from a long continued neglect to claim the benefit of it.—

A right to a penalty of a Bond &c may be waived by accepting that for which the penalty was a security.—

If a wife suffer her separate property to be used in her husbands family & neglects to charge it, she cannot afterwards claim a compensation for it.—

2 P. Wms. 82.

A contract of a lower may be merged in one of a high. er nature; but one contract cannot be merged in one of an equal degree. Co. Cl. 817.—

1 Pow. 218. 243. 2 Com. 104. 6 Rep. 45. Co. J. 479.

When the right & obligation arising out of a contract unite in one person, the contract is annulled.—

Contracts may be annulled by ex post facto Laws.

6 Bro. P. Ca. 259.

If full performance of a contract be rendered impossible by a legislative act, part performance if practicable & required by the obligee, will be enforced in Equity.—

1 Pow. 444.5. 8 Mod. 57. 2 Pow. 314 65

If the purchaser pay the consideration, & the vendor re-

Cep. 13. 7 Tom. 181.

fuse to deliver, the property according to the contract, the forma may recover back his money by Indebitatus. thus disaffirming the contract.

Contracts.

Contracts Executory and Executed

1 Pow. 235 2 Bl. Contracts executory convey no present interest, but the parties mutually trust each other.

Thus if each one agrees to sell the contract is executory, & a chose in action only is conveyed.

Contracts executed are those by which the parties mutually 2 Pow. 234 2 Bl. hand over their rights to each other & effect a change of property either immediately or on the happening of some event which does not depend on either of the parties, & in this case a chose in possession is conveyed.

1 Sum. 735, 6 - Vey. 128. Cro Eli. 33. 486. A contract containing words of present interest, but providing that a lease shall be executed in future is merely an agreement for a lease not a lease itself, tho' it contain a stipulation that the lessee shall take immediate possession.

1 Pow. 238, 9. Dang 201. Esp. 577. Sha 955. The maxim that to every contract there must be a consideration applies in its full extent only to executory contracts. A gift delivered is good at common.

An executory contract under seal, is good if it is said without a consideration can be shewn, nominal damages only can be recovered on such contract. And if a consideration be acknowledged still if the want of consideration can be shewn from the tenor of the contract itself, or by other written documents nominal damages only can be recovered.

A deed of land for which there is apparently no consideration, formerly inured only to the use of the grantor but this rule of law goes upon the presumption that in cases of this kind, no conveyance was intended.

This rule has not been adhered to in Eng. since the Stat. of Frauds, as parol agreements, (which the rule contemplates) respecting lands are made void by Stat. but if the use was declared to be to a third person it was good without a consideration. If A. in consideration of £1000 received of B. grant an Estate to B., & in writing declares the use to C. such declaration of the use is good & was formerly good by parol.

1 Pow. 368. Eq. 819. 7 Co. 40. 1 Lev. 170. Mod 504. 5 70. 1 Pow. 332.

A grant merely voluntary is operative & binding, if the deed be delivered.

A deed of land delivered is considered a contract executed. And a consideration not being necessary to support an executed contract, the fact of the delivery is the only thing requisite to the validity of such a deed, whether there was or was not a consideration is an enquiry totally immaterially

A penal bond for the payment of money, if actually delivered is good without a consideration; such a bond being in contemplation of law the same as payment of money. Therefore a contract executed is binding, even if it appear upon the face of the bond, that there was no consideration. The delivery & not the consideration

being in this as in all executed contracts, the only material enquiry.—

A single Bill was not formerly considered as a contract executed, but a mere promise not under seal, the consideration of which might be enquired into.—

A release is also a contract executed.—A penal bond has always acknowledgment of present indebtedness, a single bill formerly did not, tho' it now does.—

If a contract executory be under seal, the consideration cannot be enquired into, except by written documents. A sealed instrument according to English principles, carries with it too strong evidence of a consideration to be rebutted by parol proof.—But if it appear from the face of the Instrument, or from written proof that the executory contract was made without consideration, nothing more than nominal damages can be recovered on the contract, tho' under seal.— Thus an agreement under seal to execute a release if made without consideration will subject to nominal damages only, tho' a release actually executed without consideration is valid.—

1 Rw. 341.
1 Ford. 326.
338.

The words value received are not essential in a sealed instrument.—

The quantum of consideration is totally immaterial if it have any value.—

Eno 8. 67.
150
Eno 6. 70.

A consideration to be sufficient to support a contract must be an existing consideration

Eno 6. 348.
Esp. 95.

According to some old authorities a promise in consideration of something past, is always nudum pactum, & in some cases the old rule is retained; but where the act done & past, was beneficial to the promisor a subsequent promise in consideration of that is now binding.—

Assumpsit & not debt lies in those cases. It is
2 Bl. said by Judge Blackstone that a promise founded on a prior moral obligation is binding. This proposition tho. true in part is not so in its full extent, for if a feme covert should contract a debt & after her coverture should promise to pay it, her promise tho' clearly founded on a prior moral obligation would not bind her.—

The rule with regard to promises founded on prior
Esp 95. contract appears to be, that if the original contract out of
Cowp 290. which the moral obligation arises, & on which the subsequent
544. promise is founded, was in itself utterly void of such as re-
2 Term 765. ated no liability or semblance of liability, the subsequent
757. promise will not bind the promisor, but if there was even
5 Bing. 260. a colour for a suit the subsequent promise is good & binding.

1 Bl. R. 251. A voluntary courtesy creates no legal obligation, but it
Esp 87. 95. is sufficient to support a subsequent promise. 1 Pow. 384.
2 Bl. 290.
294.
3 Term 757. — No action may be brot. by one on a promise made to another, if the promise were for the benefit of the Pltf.
1 Vent. 318. A case of this kind has been decided in the Superior Court
Gal. 332. of Connect. where there was no relation between the Pltf.
Esp 222. 676. and the promisee. — 8 Mod. 177. 4 Vin. 153 Pow. 86. Bl. N.P. 36.—
7 Term 663

Contracts.

It has been holden that the right of him (for whose benefit the promise was made) to recover (he not being the promisee) extends only to parol promises, therefore if a Bond be given to A. for the use of B. the action on the bond must be brot. in the name of A.

1 Term 619.

Forbearance of a suit against the Deft. is a good consideration on which to found a promise. But the forbearance must be total or for a time certain, or as it is said, for a reasonable time, of which the Court will judge.

Mod. 854.
Cro Cl. 18.
Cro J. 686.
1 Rob. 256.
1 Raw. 353 pl.

Of the consideration necessary to support a contract.

2 Bl. A contract has already been defined to be an agreement upon sufficient consideration to do or not to do a particular thing. According to this definition a consideration is the essence of every contract.

1 Pow. 330. A consideration is the material cause of a contract,
2 Bl. that on account of which each party is induced to give his assent.

Considerations are of two kinds good & valuable.

2 Bl. I. A good consideration is such as that of kindred or
3 Co 83 natural affection between near relations. — 1 Vin. 427.
1 Pow. 361 Such a consideration in contracts is a good consideration.
1 Comb. 337. 2 T.R. 322. 3 B.& P. 389. where the contract is executed as between the parties. As
1 Geo. 84 in a grant by deed, from the father to his son. But against
2 Atk. 152. creditors of the Grantor & bona fide purchasers, it is gen-
2 Bl. — erally deemed voluntary & is set aside.

1 Pow. 361 & 9. And an executory contract on such consideration may
1 Vin. 427. 2 Bott 176. be enforced in Chancery in ~~in any case~~. — 3 Co 83.
1 Bl. —

II. A valuable consideration consists of something valuable,
2 Bl. — 3 Co 83 as money, goods, labor, marriage &c. —
10 Pow 335. 336.

Contracts on a valuable consideration may be made in either of four ways. —

1st By stipulating thus; do ut des, as in case of loans on bonds & promises, sales on a contract expressed or implied to pay.

Contracts.—

2d. The second species is, facio ut facias as where labor or service is to be performed on both sides; or forbearance on one side for some act on the other, or mutual forbearance.

3. The third species is facio ut des as where an act is to be performed for reward.—

4th The fourth species is do ut facias which is the counter part of the last, or the last inverted, as in the case of granting to give something, or of giving something for an act to be done.—

7 Term 354. note. Contract are divided into two kinds special contracts & simple contracts.—

Co. Lit. 172. 2 Bl. I. A special contract is one which is entered into or evidenced by specialty, that is, by deed, or writing sealed.—

II.— A simple contract is a contract by parol or in writing but not sealed. A contract not sealed and

7 Term 354. note 2 Bl. a parol contract being upon the same footing in point of solemnity.—

In connect. a seal is not absolutely necessary to to ~~[illegible]~~ constitute a specialty.—

1 Raw 330. Salk 129. It is clear that an executory contract by parol is not binding without a consideration. Such a contract is nudum

1 Raw 302. 309. pactum. Thus a promise to give me £100, or to la-

1 Term 326. 333. 7 Ray 909. bor without a reward is not binding.— 3 Bl.—

5 Term 143. But it is said by Wilmot Justice that a contract in writing

Term 1670. 2 Bl. is good, without consideration, at Com. Law.

1 Raw 293. 2 Ld. 242. This proposition Powell considers as not defensible.—

Contracts.—

In the case put by Blackstone of a promissory note an actual consideration is necessary & must be proved as between the original parties.— After the note is negotiated the promisor cannot aver the want of consideration because a third person becomes the holder, & the Law Merchant governs, otherwise a fraud might be practised on third persons.— Reducing a contract to writing then, does not supercede the necessity of a consideration.

1 Pow. 341.
Doug 574.
Hyd 155.
1 Ford. 335.
4 Mod. 242.
Sha 674
2 Esp. 71.
3 do. 227.
351.
2 Bl.

And I conceive that in strictness & in judgment of Law a consideration is not necessary to the validity of a sealed Instrument or specialty. The first the Pltff. need not prove a consideration, & secondly the Deft. cannot aver the want of it, for from the solemnity of the instrument a consideration is implied. If the Deft. might disprove he might contradict the deed which cannot be.—

~~1 Pow 343~~
348.
Plow. 308.
434.
Bac. 1637.
1 Ford 334.

If a want of consideration appear upon the face of the specialty I apprehend it is void.—

2 Esp. 577.
3 do. 438.
7 do. 477.
Bac. 1639.

The result then is, that on principle a consideration is not necessary to the validity of a specialty; but that it is binding unless the want of a consideration appears on the Instrument, or some other instrument of equal solemnity, which has reference to the contract.—

It is laid down by Powell that on voluntary covenants under seal only nominal damages will be given at Law. The want of a consideration in the case stated, I apprehend, is not supposed to appear on

1 Pow 341.
342

the instrument. His meaning then probably is that on the rent of enquiry, the want of consideration may be proved to mitigate damages and not to affect the right of action.—

The rule that a consideration is necessary to every contract applies in its full extent to executory contracts only. A contract executed by delivery of the subject matter without a consideration as between the parties, is a gift.—

1 Burr 238. Doug. 20, 21. Esp 577. Tho 955.

A consideration sufficient to support a contract may arise in two ways.— 1st From something advantageous to the party promising or undertaking, & 2d From something disadvantageous to the party in whose favor the promise or undertaking is made.

Pow. 342. Tomk 336. 1 Com. 149.

I. The promise arises from something advantageous to the promisor; as if in consideration of selling my house to E. Star to day he promise to pay hereafter.— And in most cases of contracts the consideration arises in this way.—

The quantum of consideration is wholly immaterial, for the law does not regard proportions, it is sufficient if there be any consideration, as a peppercorn.

1 Term 2 B. 1 Pow. 152. 1 Wils 230. 1 Veq. 518.

Idle & insignificant considerations are not deemed considerations, as if I engage to pay a sum of money for a lease at Will.

1 Pow. 343. Esp 94. Cro. 206. 2 Rob. 28.

But any thing however trifling, to be done by him
Paw 343. in whose favor the promise is made is a sufficient con-
Cro E. 67. sideration. Thus, if A lease to B. & B assigns to C. rent
70: 150. becomes due & C promises to pay it & A will shew
Dyer 272. him the lease. shewing the lease gives a right of action
against C on the promise. — And it has been holden in
the Court of Kings Bench in a late case that the mere
5 Term 373. relation of Landlord & tenant was sufficient consider-
ation for a promise by the latter. Thus: a declaration
stating the Deft. to be tenant, & that in consideration
thereof he promised to ~~pay~~ carry away straw &c was
held sufficient.

2. A consideration arises from something disadvanta-
Ld. 645: 216. geous to him in whose favor the promise is made. Where A.
Paw. 244. 8. or 8 Cro El.
847: 745. having a lease agst B delivers it up to be cancelled on
881. Cro J. 342. B's promising to pay the Contents. — Rob. 22. Cowp. 128.

It is a general rule that a contract is not supported by a
1 Paw. 348. consideration altogether past & executed. Thus if in considera-
Dyer 272. tion that one has bailed my servant out of prision or dis-
Cowd. 5. 302. charged me of a trespass, or built me a house gratis, I prom-
Cro E 442. ise to pay &c. the promise is not binding, for here there was
Yell. 11.
Esp 87: 95. no subsequent ~~consideration~~ no benefit or advantage arising
2 Bulst. 73. from the promise to either party. —

But tho. part of the promise or consideration be past, yet if a
1 Paw. 348. 350. part be subsequent, the contract may be good. Thus: if the
2 Bulst. 73. Cro E. 94. lessor in consideration that the lessee had accepted & paid the
Cro E. 409. rent promised to save the latter harmless: the promise is

good, tho' the acceptation is past, yet the lease was to
3 Salk. 96. continue in possession & pay future rent. —

So a contract on a consideration executed, is good if there
1 Raw. 35 Cl. was a previous legal duty on the promisor, as where one
1 Rob. R. 413. in consideration of a previous indebtedness, promised to pay
1 Leon. 409. in consideration of the Pltf's having buried his child. —
3 Ry. 260.
Cro. Ch. 138.
188. or 198.

So if there was a prior moral obligation on the prom-
1 Raw. 351. ison, this is a sufficient consideration, as where a promise is
1 Ford. 336. made to pay an honest debt barred by the Stat. of lim-
3 Ray. 129. itations. So in case of a promise to pay by the father,
Cowp. 290. for the past nursing of his natural child.
Esp. 95.
B. N. P. 147.

So a consideration completely past will support a
1 Raw. 351 & 2 contract, if the consideration be at the request of the prom-
1 Vent. 268. ison, for the contract tho' subsequent complies itself with
3 Salk. 96. the previous request. — As where I promise to pay
1 Bulst. 121. in consideration that James Gould had at my re-
Dyer. 272. quest bailed my servant. Cro. Ch. 42: 282. Esp. 95.
Cro. Ch. 409.
Cro. J. 18.
1 Ford. 336.

A mere stranger to a meritorious act done
1 Raw. 343. to another, cannot support a contract upon it in his
343.
1 Vent. 6. own favor, for he does nothing favorable to the prom-
318: 332. ison or disadvantageous to himself, he being a stran-
8 Mod. 117.
Cowp. 473.
Vel. 24. ger to the consideration. — As where A in consideration
1 Str. 35.
3 Bur. 186. that B will acquit him of a trespass promises B. to
2 Ch. 1.
4 Vin. 15. pay C. £100. —
Bur. 2680.
Esp. 76.
B. N. P. 35.

But a consideration moving from one will support
a contract in favor of a near relation. — As where a prom-
Raw. 350 or 380. ise was made to A (in consideration that he would pen-

1 Vent. 318. 332. form a cure) to pay his daughter.

When forbearance of a debt is the consideration
1 Saw. 353. 354. there are two requisites. 1st The forbearance must
Cro. Eli. 206. be either general, that is, total, or for a certain period
Esp. 95. and 2d It must be of an action in which the promisor or person to be liable, is chargable

1st A promise to pay a debt therefore in consideration that the Plff. would abstain from suing no time
1 Saw. 353. 354. being limited; & forbearance not being expressed to
Cro. Eli. 19. 455. be total, is not good. Hutt. 108. But where the consideration was forbearance for a reasonable time, it was
Esp. 95. held good, & that the Court ought to judge whether it was a reasonable time or not so.

2d A promise by a mother to pay a debt due from
1 Saw. 354, 5. her son who was dead, if the Plff. would forbear to sue
Hard. 73. her was held not to be obligatory; for there was no
3 Salk. 96. consideration to support it. The mother was not liable & of course forbearance was no favor to her & no discharge to the Plff.

So if one be arrested on void process &
1 Saw. 355. another in consideration of his release promise to pay the
Hard. 73. Esp. 94. the latter is not bound for here is no consideration.

So a promise by A to pay B's debts, if the Creditor
Saw. 356. will forbear to sue B for 6 months is not good at
Hard 75. Com. Law; for he might sue B. immediately, & therefore the forbearance was no prejudice to the Creditor.

1 Saw. 356. But a promise in consideration of forbearing a suit

Sta. 142. Dyer 272. is good, if there be a reasonable ground for the suit. Thus: where an Infant bought silk & velvet & died. His Exr. in consideration of forbearance promised to pay, the promise was good at Com. Law; here was colour for a suit he being Executor —

When a promise is in consideration of forbearance of the original cause of action is not to be enquired into; it is acknowledged by the Promise. 1 Pow. 357. Hob. 18.

When that which is stipulated on one side is in consideration of forbearance on the other, the considerations are termed mutual: as where A. agrees to pay B. for doing a certain act; here the doing the is a consideration precedent to his right to the payment. If he sue for the price, he must aver performance. — 1 Pow. 357. 1 Vent. 177. 244. 3 Salk. 95. 1 Fonb. 380. 1 Bl. 274. 5. 277. 7 Co. 10. 7 Term. 130. ~~7 T.R. 130~~

So where performance on both sides is to be concurrent, neither party can compel the other to perform, till he has performed his part or offered to perform; as where A promises to deliver B. a load of wheat on such a day for such a price. — 5 Term. 761. 7 do. 761. 125. 5 Com. 50. Salk. 112. 113. 171. Doug. 639. 688. 666. 6 Bl. 363. 8 Term. 366. —

If the agreement be that ~~on~~ one ~~side~~ shall do an act for doing which the other pays, the doing is a condition precedent; but if according to the terms the money is to be paid on a day, which is to arrive before the act can be done: here indeed the payment is a condition precedent. — In case where A agrees to give B £ on the first of August 1804 for work which is to be done on the first of September of the same year, here B can sue for his £ before the time comes to 1 Pow. 358. 1 Fonb. 381. Salk. 171. 7 Co. 100. 1 Vent. 147. 8 Mod. 42. 5 Viner 70. 2 Ray. 662. 1 Saund. 319. 7 Term. 130.

do the act.—

Dy. 76. But if the day appointed for payment, be to arrive
1 Rob. 414. 415. after the time fixed to do the act, the performance of the act is
1 Pow. 358.
Salk. 171. a condition precedent & must be averred in an action for the
3 do. 95. money.—

But where the promises are mutual, i.e. where the promise on
1 Pow. 359. 360. each side, is the consideration of that on the other, & a performance
1 Ver. 117. 214. is not a condition precedent on either side to a right of re
Doug. 88. covery, either may sue without averring performance on his part—
1 Lev. 293.
3 Bulst. 187.
Hand. 102.
Salk. 24. 5. Mod. 411.—

The rule does not obtain in Equity, for here the Plff.
1 Bra. P.C. 184. must aver performance or readiness to perform, tho. the
Forb. 12. 445.
2 Fram. 35. covenants are mutual, otherwise equity will not interfere

If the payment be in this form. "I promise to pay
Salk. 112.
Hob. 663. $100. in 6 months, you transferring stock" and & converso
Bl. R. 1312.
12 Mod. 403. the promises are not mutual, & neither can compel per
1 Forb. 382.
1 Ch. Ca. 27.
4 Term 761. formance till he has performed.— Wils. 496.

The question whether promises are mutual or dependent
Doug. 665. is to be determined by the meaning of the parties, to be
1 Term 645.
6 do. 570. collected by the spirit of the agreement, & the nature of the
7 do. 130. contract, that is from the order in which the intention requires
their performance.—

When the promises are mutual, it is no bar to
Doug. 665.
Rob. R. 1312. an action that the Plff. has not performed his part, each may
1 Forb. 382.
1 Lev. 16. may have a cause of action agst. the other at the same time
3 do. 41.
Comyn 5. 6.
4 Term. 761. The Eng. Courts have leaned of late agst. construing prom
4 Term. 761. ises so as to render them independent, as such a construction

has a tendency to multiply suits.—

1 Pow. 363. Salk. 24. Hob. 88. Mutual promises must both be binding or neither will, & both must be made at the same time, otherwise they are mere nuda pacta.—

2 Ray. 909. 910. 919. 920. Cro. J. 667. 5 Com. 143 1 Pow. 364. Com. 133 The mere act of intrusting property to another on his undertaking to do something respecting it, is a sufficient consideration. As in case of a delivery of money to be delivered over to another. — Salk. 26. Pow. 362. 1 Atk. 3.—

The preservation of the honor & peace of a family has been holden a sufficient consideration in Ch. Law — As an agreement between the putative father, son & natural child, to prevent family disputes &c

Pow. 362. 1 Atk. 3.

A compromise of a doubtful right, was holden to be a sufficient consideration in Ch. Law. as the settling the bounds of lands. 2. Veq. 284. or 234. 2 Vent. 352. —

1 Pow. 363, 8. 1 Atk. 10. 2 do 152. 1 Ver. 4.

It is not necessary in contracts, that the consideration be expressed in direct terms; it is sufficient if one can be collected from the whole agreement taken together. —

1 Pow. 368. 1 Veq. 450.

But if an express consideration appear upon the face of the contract, the better opinion is that no other can be implied or averred; for it is a maxim that nothing can be implied when it is expressed. —

7 Co. 40. 1 Pow. 368.

At Com. Law fraud in the consideration of the contract, does not in general vitiate it, tho. fraud in the execution does. The reason of this distinction is, that assent is wanted in the second case, but not in the first—

2 Co. 3. 3. 9. 10 do 27. 2 Bac. 594. 2 Bl.

But Chan. will relieve against contracts by fraud in the consideration. At law the party must resort to his special action for the fraud committed upon him.—

1 Ver. 145 pl.
2 Ch. Ca. 203.
3 L. 290.

In one case however the Court of B.R. seems to have considered fraud in the consideration of a contract a good defence. But the circumstances of the case were peculiar, perhaps other points in it influenced the decision.—

3 Term 438.

Of the consideration in contracts again considered.—

In every executory contract a consideration is necessary to give it validity; therefore it is that a promise to do an act for another as to build him a house or give him a sum of money, is not binding & can never be enforced either at law or in Equity: but if the contract has been executed, that is to say if the gift has been made & the possession of the property parted with by the donor, property so given is liable to the creditors of the donor, for every man must be just before he is bountiful, but this does not affect the right of the donee agt. the donor. This doctrine, I believe is universally admitted to be sound, so far as it respects personal property, but it is said if a man conveys land to another without any consideration, such conveyance shall enure to the use of the Grantor only.—

There does not seem to be any reason why a man should have greater benefit from real property when he parts with it

voluntarily than from personal. The reason why we find such a proposition in our books I apprehend to be this. During the civil wars in Eng. between the houses of Lancaster & York, the real property of the leading characters in the nation was greatly exposed to confiscation for rebellion as the contending parties alternately prevailed, they would therefore convey their real property to absent persons (who would not probably take an active part in the commotions which then agitated the country & if they did would not be noticed) to their own use or that of some friend whom they wished to provide for in case of their death, for it was an established principle that an use was not subject to forfeiture, & the grantee to uses had only the legal title, & the grantor was entitled to the beneficial interest, for should the Grantee attempt to prevent the grantor from enjoying the estate so granted, a Court of Chan. would compel the Grantee to suffer the Grantor to improve the Estate as his own. During this period it happened that if a man granted his Estate to another for no consideration the presumption was that it was granted to his own use, but in that case there can be no doubt, but that the deed passed the legal title to the grantee, & the use by the Courts of Chan. adopting the idea of the presumption alluded to, vested in the grantor. If this be a just mode of considering the subject, it is apparent that this doctrine grew out of the state of society in Eng., & cannot be applicable to any other Country under different circumstances. But it has become an established rule and of course when the Stat. of Uses was enacted giving to the cestuy que use the legal title, such conveyan-

ces, had not any the least operation; for if it might be said that it transferred the legal title to the grantee, the Stat. immediately transferred it back to the Grantor, it seems to me that in this Country no presumption can arise of an intention in the Grantor, that he should be entitled to the use, if upon general principles I entertain no doubt, but that a grant of land without any consideration, good, or valuable attended with the delivery of the deed, as much vests the land in the Grantee, as a gift of a horse attended with a delivery vests the property of the horse in the donee. I consider it therefore as a sound principle that in contracts executed, no consideration is necessary to vest a title to property granted; and it is as universally true that a consideration is necessary to give validity to an executory contract.

Who a consideration is necessary to an executory contract, yet if the contract is in writing, & acknowledged that it was made upon a valuable consideration, no parol proof is admissible to shew that it was not, but this does not proceed upon the ground that a consideration is not necessary where the contract is in writing, but parol proof cannot be admitted to contradict what is alledged in a written agreement; for if the consideration which is acknowledged to be valuable in a writing should be detailed at length in the instrument itself, or any other collateral instrument counting upon such ~~could~~ contract ~~would have~~ & when detailed it should appear to be no consideration in the eye of the law, I apprehend such contract would have no more validity, than a parol contract without consideration — for in this case the

want of a consideration is not shewn by parol testimony but by written documents of as high a nature and validity as the contract itself. —

If the written contract should not acknowledge any consideration, then indeed it may be averred in the declaration that there was one, & this averment may be supported by parol proof; for altho' you cannot introduce parol proof to contradict a written agreement, yet you may introduce it when it stands well with the agreement & seems to give it effect.

Here we must notice a difference between a mere written agreement & one that is sealed. If this becomes a specialty, & altho' there is no consideration expressed in the agreement, there is no necessity to aver any to give it validity, for from the act of sealing, it is presumed that there was a consideration, and of course if there is a covenant to do any collateral act, the Pltff. must recover on the contract, when there has been a failure of performance, whether any consideration is acknowledged or not. but as it is not consistent with the rules of law that the quantity of the consideration should be enquired into, & there appears to be no other than what is implied from the act of sealing, in such case only nominal damages will be recovered, and a Court of Equity will never decree a specific performance of such a contract. —

If the contract is to pay a sum of money as in a bond or covenant, here the action must be an action of debt, & in this action the whole sum must be recovered, if any thing. & is not

governed by the rules that operate where the action sounds in damages, where the triers are at liberty to give less or more damages according to the equity of the case. —

In such cases it is plain there can be no use in the enquiry as to the quantum of consideration, for if there is any consideration the whole sum must be recovered, & it is certain from the seal that there is a consideration

Notwithstanding these observations, I should suppose that the contract being sealed, would not in every case give validity to a specialty; suppose for instance that the contract detailed at length the consideration a the bond in the condition discovered the consideration, if it ~~w~~ was one which the law considers as none; here altho the law presumes a consideration from the act of sealing, yet in this case this presumption is completely rebutted by the instrument itself, shewing what that consideration is. — N.B. In Comm.t we consider Notes of hand as specialties. —

The manner of closing a Contract.

1 Bac. 941.
1 Bur. 333.
2 do 268, 64
Rob. 41.
Ab. Eq. 363.
2 do 316.

When the terms of a contract are mutually accepted — As if A says "I will take £20 for my horse" either party may close by tendering on his part.

Jones Bail.
Cro. J. 378.
1 Ld. 275
1 Sum 64.
2 Ch.

But if in this case no tender be made, no delivery be given, no earnest accepted, & the parties separate, both are at liberty to refuse performance; but if a day of payment be fixed within a year, the party is charged and neither

is at liberty to retract.

Quere. Is the vendor in the last case obli-
1 Kb 363. ged to deliver the horse on the day fixed without receiving payment?

1 Bar 358. A promise made in consideration of an act
1 Ford 380. to be done, is not binding till the act ~~be~~ is done, or perhaps
5 Term 409. 6 do 571. till the promisee has offered to do the act, if has been
668. 1 Vent. 177. prevented by the promisor. And in a suit on the prom-
214. 7 Co. 10. ise, performance or at least an offer of performance must
~~Bro Ch 889.~~ 4 Bar 16. be averred. — 2 Kb. Rb. 570.

But where one promise is in consid-
eration of another performance it need not be averred by
1 Vent. 177. 214. either party. In case of conditional promises — As if A agree
Sh. 112. Sho. 458. to make a deed to B on the tenth of May, B paying £100, to
Cro C. 888. 12 Mod. 563. A on the same day & making such a deed, the contract is
Kb Rb. 270. 272. inchoate only. But either party may on the day fixed, tho' not
1 Ford 381. afterwards close it by performing on his part. If neither
Doug 688. 684. party perform his part at the day, the contract is at an
4 Term 761. 766. end. — But if on promises of this kind suits are brought by either
5 do 555. 571. party performance must be averred. — 7 Term. 125.

Actions founded on Contract.

I. Account.

This is an action founded upon an express or implied contract that one who has received property of another to account for, will render his account for it. If he does not render it this action lies.—

1 Bac 16. 6 Co Lit. 172a. 1 Com. 85. 2 Rob. 161.

It lies at Com. law only against Guardians in soiage, bailiffs & receivers, & Joint tenants, they being receivers for each other.—

By Stat. 4th Ann. this action is extended in favor of one Joint-tenant & tenant in common against the other as Bailiff.—

1 Bac 17. 1 Com 88, 9. 6 Co Lit. 89a.

At Com. Law the action lay only between the original parties themselves, & not for or against their Exors & being founded on such privity of contract, as that one party was supposed concordant of the others disbursements &c. But to this rule there is an exception in favor of Joint-merchants, ~~not against them~~ who might maintain the action at Com. law.

1 Com 88 2 Inst. 404.

By the ~~Stat.~~ West. 2 that is 13 Edw. 1st & 25 Edw. 3 & 31 Edw. 3 this action was extended generally to Exors the Exors of Exors and Admors. Stat. 4 Ann. extended it agst. Exors & Admors of Guardians & wards, Bailiffs & receivers & to and agst. the Exors & Admors of Joint tenants and tenants in common.—

1 Bac. 17. 6 Co Lit 89a. 3 Bac.

Contracts.

The distinction between Bailiffs & Receivers is this: A Bailiff is one who has received the property of any kind of another to improve for the owner & Co Lit. 172. amount & who is entitled to an allowance or wages for his reasonable expences & charges

A Bailiff must account for profits which he Co Lit. 172a. has made & for those which he might have made by reasonable industry.—

A receiver is one who has received money to the use of another to render an account Co Lit. 172a. & who had no allowance for his trouble.—

Generally ~~an~~ a receiver ~~is~~ has ~~an~~ no allowance and Co Lit. 172a. is not bound to account for the profits, but to this there 1 Bro. 19.- is one exception as between joint merchants, for here the Deft. has an allowance and accounts for the profits—

Co Lit. 172a A Bailiff cannot be charged as receiver, because Bro. 19.- if he were he would loose his allowance

This action being founded on privity of contract, lies 1 Vern. 436. not in cases of tort, except in favor of the king & 2 do. 342. 295. 1 Atk. 489 infants.—

1 Com. 86. Bro. C. 227. In declaring against a Bailiff or receiver, the Plff. states that he delivered such property to the Deft. as Bailiff &c & that the Deft. refused to ~~deliver~~ render his reasonable account, to his damage &c. & demands of the Deft. his reasonable account together with his damages aforesaid & his costs. &c.—

In case of partner-

ship of S suppose of joint-tenants for. the Pltff states, that the Deft. has received more than his part.

It is said that an action of account lies not where the sum is certain. As if one delivers £100. to A. to trade with The former shall not have account for the £100 but for the profits. Quere. Does not this action lies against the sheriff who has received a certain sum.—

1 Bar. 19.
2 Brownlow 76.
Hob. 206.

Should not this rule be, for a sum certain one cannot be charged as Bailiff.—

1 Com. 87.

Where one receives money to the use of another to render an account, an action it seems will lie for an amount of the money received.—

6 Lit. 172a
1 Bar. 21.
2 Mod. 101.
1 Com. 87.

If money has been received of A. by B. to deliver to B. account lies by B. here B. the Pltff must declare of whom the money was received.—

6 Lit. 172a
1 Com. 88.
1 Rob. 120.

So if money be delivered, to be redelivered on a certain event.

1 Com. 87.

Still if I deliver money to A to deliver to B. for my use, if A. delivers it, I cannot have account against B. for he is not privey to the use.—

1 Com. 89.
1 Roll. 118.

If the Bailee of goods wastes or refuses to deliver them, account will not lie; but trover or Detinue well, for he does not receive them to improve or account for

1 Com. 89.
1 Bar. 19.
1 Rob. 116.

So it does not lie against the Disseizor for the profits, for the action is founded on contract; except in the case of an Infant, he may consider a disseizor and treat him as a Guardian.—

1 Com. 89.
1 Leon 24.

1 Com. 87:89. If the Bailiff he make a Deputy, it cannot have
1 Rob. 118. this action against the deputy for want of privity, but
128. the Bailiff he may.—

1 Bac. 17. Tho. an Infant may be an Ex.r of liable for torts, yet if made Bailiff he is not liable to account
1 Com 89. for he cannot contract if is supposed incapable of account
Cadit. 172. ing.—

In an action of account if the Pltf. prevails, there are
1 Bac 21. two Judgments, first that the Deft. do account, after
Mod. 42. which auditors are appointed before whom the account-
1 Com. 92.5. ing is had.—
1 Wils. 99.

The Auditors then make their report, and final judgment is rendered upon it as on a verdict.—

1 Com. 95 Before auditors the parties are of common right
Cro El 806. entitled to testify.
3 Wils. 16.

If the Deft. refuse to go before auditors
ante.— to produce his accounts, the auditors must award to the Pltf. the whole of his demand.—

If auditors find a bal-
1 Bac. 16. lance in favor of the Deft. they may award it, if judgment goes for him to recover damages.—

This is the case in Chancery only.—

If he who receives property of another to account,
Bac 20. makes an express promise to account, this action or
Salk. 9.
Salk 89. special assumpsit will lie.
Esp 97.

But in this case it is said by
Salk. 9. Holt, the Pltf. shall not travel into the particulars of

Carth. 89. the account, but confine himself to the damages which
Esp. 97. he has sustained by the Deft's not accounting.—
Dudee Bar. 22.

Does not this imply a promise? & is not this a
1 Bar 20. good ground of Assumpsit.—

If one by deed acknowledges that he has received
1 Bar 19. property to account; the Pltf. has his election to bring an
1 Rol. 118. action of account, or on the Deed.—
Cro El. 644.

If one finds property of another, account lies against him, for the action is founded on privity of contract, trust confidence &c.—

As to what the Deft. may plead in bar there
3 Wils. 113. is much contradiction
104.

It is competent for the Deft. to plead any thing to the
1 Bar 20. action, which shows that he is not bound to account.
1 Com 91. It is a good plea therefore, "that he never was Bailiff" or
or 19. this is the general issue.—

1 Rol. 123 So a release of all actions is a good plea in bar.
1 Bar 20.
4 do. 83. So an award of arbitrators, that the Deft. should be ac-
Cro. C. 82. quitted is a good plea in bar.—
4 Bar 85.

Plea that the Deft. received the money to deliver to
1 Com 91, 4. J.S. & that he has delivered it is a good plea.—
Cro E. 830.
3 Wils. 115.

But plea that the Deft. has made payment of the
1 Bar. 20. money is not good, for he was bound to account

So a plea that the Pltf. has made & given him
4 Bar. 85. a receipt for the money received is not good, for a receipt
6 Co. 7. is but evidence of payment which admits former liability &
does not affect the Pltf's right of ~~action~~ account.—

So "that the Deft. has fully accounted" is a good plea in bar. On this plea the Deft. can not go into the account but must prove the fact.

Wils. 113. 1 Com. 91.

It is a general rule that if the Deft. shews that he has ever been liable to account, no plea in bar of the action is good except "fully accounted" and a release or something equivalent to it, as an award of a release or in discharge &c. other things must be pleaded before auditors. —

1 Com. 91. 92

"Fully accounted" "release" &c must be pleaded specially. —

3 Wils. 113 114.

Before the Auditors parties may plead & join issue in law or fact, the issue is then to be carried back into Court & there tried —

1 Com. 93. 1 Bac. 21. 3 Wils 99. 117. Cro Eli. 34. or 84: 806.

Whatever can be pleaded in bar to this action must be so pleaded, & not before auditors, because it will avoid trouble & charge to the parties. 3 Wils. 114. —

2 Ates. 711. 1 Bac. 21. 1 Com 93. 3 Wils 73. 113: 101. Leon. 219.

And nothing can be pleaded before auditors contrary to what has been pleaded in Court & found.

Therefore "never Bailiff" &c "release," "fully accounted" or award in discharge," are not good before auditors. —

Cro Eli. 82. 3 Wils. 113.

It is a good discharge for the Deft. or as it is sometimes called, good accounting to shew any thing which could not be pleaded in bar to the action, but which discovers that he ought not to be eventually liable. —

That the property in his hands was lost at sea in a tempest, or that they were cast overboard is good be-

1 Rol. 124. 1 Bac. 121. 1 Com. 93.

Co Lit 89.a for auditors. —

So if the goods were taken by robbery without his fault, or taken by an enemy. —

1 Bac. 21.

Quere. was not the plea that the goods were taken by enemies in Arms, a plea in bar to the action —

Sha. 680.
Com. 91.

That the property was perishable & in danger of perishing, & that he sold it on credit, without a special commission to this effect. —

1 Bac. 21.
2 Mod. 100.

The Deft. accounting is allowed all losses occasioned by inevitable accident, by open enemies or robbery without his fault. —

Com. 94.
Co Lit. 19.a

When the report is returned to the Court, final judgment is rendered for the sum awarded —

In Eng. the action of account is not much in use. The common remedy is in Chan. for in Courts of Law the Pltf. is not entitled to a discovery of books, papers &c nor to the Deft's oath. —

1 Bac. 10.

3 Bl. 381.
437.
449.

Contracts.

II. Debt.

The legal acceptation of the word "Debt" is a sum
Esp. 172. 313. of money due by a certain express contract, as by a bond
for a determinate sum, note, special bargain &c. —
Doug. 6. 1 Bl. 550 So for a sum capable of being ascertained
the action of Debt lies in some cases on contracts im-
4 Co. 94. plied, but not I presume to on a parol contract im-
3 Bl. 1 Bl. 550. plied: — As if A sold goods & agreed by parol for a fix-
ed price, Debt lies, but if no price is fixed debt
will not lie. —

Debt on simple contract was discussed in Eng.
by reason 1st of the wager of law, which is the Deft's
swearing that he owes nothing, & compurgators swear-
3 Bl. 155. ing that they believe him. —

Wager of law is equivalent to a verdict
3 Bl. 343. for the Deft. —

2d Because the whole sum demanded must be recov-
3 Bl. Cyc. 219. ered if any according to the old rule. — 2 Roll. 706. —
1 Bl. 249. 550. Bl. Re. 1221. This rule is not now observed Doug. 6. 703. note

In some case "Debt" lies not on express
Esp. 172. simple contract — as against an Exr or Admr for a
9 Co. 87. 2 Co. 86. 155. 187. testator might have waged his law, but an Exr or
Admr cannot. —

If one expressly promises to pay a dim-
Esp. 173 certain for property to his use, or for services ren-

Contracts.

ded to himself debt lies. — Otherwise in some cases
1 Burr. 1386. if he promises for another — As if a promise made to
Croc. 107. A. to pay the debt of another due to him, in consequence
1 Str. 193. of A's relinquishing in favor of the promisor a lien
on the Debtors property. Debt in this case will not lie
the proper remedy is Assumpsit. —

If a person promise to pay for goods, when the
person for whose use they were delivered is not liable;
it seems that Debt will lie. Quere 2 Ray. 842. & 572.

So Debt does not lie against the ~~maker~~ acceptor of a Bill
Esp. 173. of Exch. ~~he is neither in the nature of a debtor nor~~
Salk. 23. ~~guarantee~~. The Drawer is the debtor & liable in debt. —

Debt lies in some cases on implied contracts, & some
times where there is nothing like a bargain or contract or
2 Bar. 14 other commercial transactions from which to imply a
1 Rol. 598. contract, as on a penal Stat. when the penalty is certain,
there being no specific mode of recovering the penalty pre
scribed. —

This is the Com. practice in Eng. —

+ Cast. 360. * To debt on a penal Statute, not guilty is a good plea
1 Sum. 462. Not guilty is not a good plea to debt on a specialty.
2 Ray 1500.

Tho debt lies not to recover damages, yet af-
2 Bar. 14. ter damages are recovered, it lies on the Judgment, for
1 Rol. 600. 1.
2 Bl. .. the demand by the judgment is made certain —

Stra. 923 So upon an award of arbitrators to pay a certain sum. —

1 Burr. 2482. When the Deft. in a Judgment is in custody ~~of~~ on the
1 Sum. 557. Execution, Debt on Judgment does not lie, so if being in

6 Geo. 5-25 custody he is discharged with the Pltffs consent; for
7 do 420. taking in Execution is satisfactory in Law. — 3 Wils. 13. —
8 do 120.

Generally Execution cannot issue in Eng. after
2 Bac. 360. a year & a day, & in this case the Pltffs only remedy was
6 Earth 30. by debt on Judgment by original writ. — after such
1 Sid. 351 a time payment was presumed. —

The Stat. West. 2: gave a scire facias in this
2 Bac. 362 case to shew cause why execution should not issue, &
Cro. 364. since after a year and a day the Pltff. cannot sue exe-
1 Rol. 889. cution without a scire facias except where execution
6 Mod. 288. has been stayed by writ of error or some other cause.
Earth. 283.
or 233.

It has been said that in Eng. debt on Judgment will
1 Rol. 601. not lie within a year & a day. —

Quere. It is said in Bacon, that debt on Judgment
1 Sam 637. will lie, to punish the Deft. for not paying the money re-
2 Bac 14. covered by the Judgment, without putting the Pltff. to the
6 Earth. 30. trouble & expence of levying the execution, and thus
3 Bac. — compelling payment. — It seems therefore that the action
will lie before a year & a day. —

The unreversed Judgment will support this action, for
2 Bac 211. such Judgment is valid to all intents & purposes till
7 Sam 458.
5 Wils 345.
8 Co. 142. reversed. —

By the constitution of the U. States full confi-
dence is to be given in each State to a Judgment recov-
ered in another. — If therefore an action is brot. in one
state on a Judgment recovered in another, no enquiry
can be had into the original cause of action. —

A judgment rendered in a foreign country is both
1 Doug. 1 in Eng. & the U. S. prima facie evidence of a debt but
2 Wm. 410. in an action on such judgment enquiry may be had
1 do. 158. into the original merits.

Formerly it was held that debt would not
Stra. 1090. lie on a foreign judgment.

The Pltff. in declaring need not shew the original con-
Doug. sideration.

To debt on such judgment "nul tiel record"
2 Wm. 410. is a void plea, yet declaring on the record does
2 Show. 232. not vitiate the declaration.
Gray 472.
Skin. 95.

Indeb. Assu. is concurrent with debt on foreign
judgment Doug. 4.5.6.

It is said where Indeb. Assu. will
Doug. 6 lie Debt also will lie: this is not always the
case as where money is paid by mistake, obtained
by fraud, by breach of trust by sale of property con-
verted by a stranger. The rule is to be understood
I conceive in general of express contracts, of those im-
plied from transactions in the nature of contracts,
as for example, sale of goods without express prom-
ise. A foreign judgment is not altogether like
one of those cases but seems to be so considered.

If Judgment has been obtained by fraud it
Stra. 509. is a mere nullity. Cro. J. 514. 2 Wils. 47. 3 do. 341. 1 Bl. R. 845.
993.

For money received by Bond or single Bill debt
2 Bac. 13. is the only remedy.

Contracts.

If a Bond is given conditionally for the performance of a collateral act, there is sometimes a remedy in Chan. it being received as an agreement to do the act. But the only common Law remedy is the action of debt for the penalty.—

A Bond payable generally, that is
Dem. 124 no time of payment being fixed, is payable on the day of the date.—

On a contract to pay a sum certain
Sta. 1089.
1 Rob. 591. debt lies.—

If there is a covenant with a penalty, the obligee has his election to sue for the damages in
2 Show 163
Cowp 163 "covenant broken" or in "debt" for the penalty unless it appears that the obligor was to have his election to do the act or pay the penalty. In such case on non performance of the act, the action lies for the penalty only.—

Debt lies against an officer
2 Bac 14.
Rob. 206. who has collected money on an execution, on a re-
Moor. 385.
a 885. fusal or neglect to pay it over, for levying it implies a contract in law.—

This seems an exception
2 Hob 550. to the general rule, that it lies not on parol contracts implied. But by levy the Judgment debt is considered as transferred to the Sheriff.

Cro. J. 514. But debt will not lie for collateral articles levied on, & not sold for want of purchasers.—
2 Bac 14.

But if the collateral articles taken were estimated in his return, at a sum sufficient to pay the debt &c if he should neglect to sell them, it would seem that debt lies against him. — For his own return shews, that the Deft. in execution ought to be exonerated. —

Hob. 206.

In debt on parol contracts the Stat. of limitations, or a release may be given in evidence under the General issue —

Salk. 278.
3 Bac. 518.
Ray 566.
Esp. 262.

Contracts.

III. Detinue.

3 Bl. Com. 361.

The action of Detinue, lies for the recovery of a "specific chattel" in nature of a Bill in Chancery. The judgment is for a restitution of the things detained, conditionally, viz, that if it cannot be had, the Deft. shall pay the value & damages of detention.—

It lies to recover any thing which can be identified & not for money, coin &c.

It lies for a piece of gold of such a value as 20s but it does not lie for 20s in money.—

It lies in those cases only in which the Deft. obtained possession lawfully as by delivery or finding.

3 Reeves Hist. Eng. Law. 67.

The action of Detinue seems founded on contract, & may be joined with Debt in the same declaration.

4 Bac. 11.

Trover lies in all cases where detinue lies, but this rule does not hold e converse, for trover lies where the taking is tortious.—

The reason why detinue does not lie where the taking is tortious, seems to be, that originally a tortious taking was considered as divesting the owner of his property. And in detinue the Plff. must have the property of the thing demanded. This action was disused by means of the wager of law. Trover has taken place of it, under the equity of the Stat. of West. 2d.— As to the evidence in this action See Gilb. L.E. 535.

Contracts.

Assumpsit

Law Gram. mar 351. 1 Bac 163 B.N.P. 158.

— Assumpsit is an action founded on simple contract whereby damages are recovered for a breach of any promise contract or undertaking.—

The action of assumpsit is derived from the Stat. of West. 2 —

Of Assum. there are two kinds 1st Express & 2d Indeb. Assum. The former of these lies on express agreements promises & undertakings which may be either written or parol —

B.N.P. 128. or 123. 1 Bac 163.

2 Serm 28.

The ground of recovery in this action is the agreement which is also the rule of assessing damages.—

The latter is founded on a duty or moral obligation which creates a promise by implication of law.

1 Ld Ray 553. 6 Mod. 131.

But it also lies in cases where it is impossible to presume a promise, or where a husband has forbidden any one to supply his wife whom he has turned out of doors, with any thing on his account. Where one robs another of his money in these cases Indeb. Assumpsit lies.

Skip the dots...

But if it appear that the promisor was to have it in his election to perform the promise or to pay the penalty, action lies for the penalty only.—

A breach of trust by which

5 Term 6 D3. 3 Bro. 6. 29. one has been deprived of a sum of money is a ground of Assumpt.

Ind. Assu. lies in some cases where a special Assu. does not. — As for the price of goods sold on a quantum valebat where no express agreement was made. — Also for services done on a quantum meruit no price having been fixed by the parties. —

It may then be laid down as a rule that whenever one is bound in justice & good conscience to pay money to another, the action of Indeb. Assu. lies to recover it, unless where justice or national policy forbids a recovery; as in cases of debt on which the Stat. of limitations has run, or on gambling debts &c. —

Gilb. L. E. 35. —

The damages in this action are not ascertained by the agreement, for usually there is no agreement, but they are such as in equity and good conscience ought to be recovered. When a contract is detailed at length whether it be parol, written without seal, or written & sealed, the action for breach may be brot. on the promise; & if in contracts of this kind a debt is created by the agreement, a Special Assu. Indeb. Assu. & the action of debt are concurrent actions, & the Plfff. may have either at his election. —

Upon a breach of contract neither debt nor Ind. Assu. but a special assumpsit lies for a recovery of damages; the damages being uncertain. But if the damages for non performance are assessed by the

parties to the contract Indeb. assu. also lies. In the latter case, the Plff. the promisee may at his election bring Indeb. assu. for the penalty agreed upon, or a special assu. for damages to be assessed by a Jury if it appears that the penalty was in the nature of a security for performance, to make the promise stronger.—

But if it appears that the promisor was to have it in his election to perform the promise or pay the penalty, action lies for the penalty only.

5 Term 603. 3 Robt 29. A breach of trust by which one has been deprived of a sum of money is a good ground of Assumpsit.

Ind. assu. lies in some cases where a special assu. does not. as for the price of goods sold or a quantum meruit valebat, where no express agreement was made also for services done on a quantum meruit no price having been fixed by the parties. And is not necessary for the Plff. to declare the premise sum due.—

3 Bac 163. Burr 1012. Cowp. 116. 797. 798. So for money loaned or for money paid to the Deft.'s use at his request express or implied; or expended for that which it was his duty to do. Indeb Assu. lies. 1 Term Rep. 174. 185.

1 Term 220. Esp. 95. B. N. P. 147. 1 Ch. Ca. 90. 3 Bac. Thot not if the money was paid or expended against the will of the Deft. In these cases debt also lies. Quere.

1 Bac 163. Esp. 460. 92. Burr 1008. Notwithstanding the general position that Indeb. assu. lies in those cases only in which debt lies; there are some cases where Indeb. assu. is the only action, excluding both debt & special assumps. as for money paid

by fraud, or money paid by mistake, and here it lies
1 Term 285. in disaffirmance of the contract.—

In the last case an action of fraud is in one sense concurrent.—

2 Term 648. 3 Burr 885. Money paid by mistake under a rule of Court cannot be recovered back:—

8 East 218. This action will lie on an advertisement offering
2 Term 278 a reward &c Esp 141. Salk 86. 1 Term 110. B.N.P. 129.

It lies on an Insimul Computasset. It is not absolutely necessary to an amount stated, that it be
Watson 221. 2 Atk. 251. signed.—

An Indeb. asse. will not lie for money had & received, for a payment made on express contract, ~~still~~
Doug. 23 1 Term 133. Comp. 818. still open.—

For while it is open, damages only will be recovered of those on the special promise, alter if the contract is at an end.—

B.N.P. 131. If a horse be taken by a wrongdoer, the owner
B Ray 1217. may bring trover for the horse, or if he is sold, if not
Comp. 418. otherwise Indeb. asse. (X) for the price actually received
1 Term 387. 2 do 147. 4 do 687. or perhaps agreed for; not as the case may be the actual value. Will it lie if the horse was stolen? this
5 Com 582. 3 Ba. 176. 177. 263. depends on the doctrine of merger.* — Stra 873. 373.
* 3 Term 176. B Ray 1572 Comp. 166. 796. 787. the action of Indeb. asse. will not lie for money had & received, to enforce an unconscionable claim.
Watson 198. 199. For money obtained by oppression, fraud,
Burr. 1005. Comp. 197. B. Re. 1073. imposition &c Indeb. Asse. lies Doug 45-1. B.N.P. 132 1 H Bl. 63. 4 Term 485. 561. — (X) 1 Saund. 216. a. as to this doctrine

So for money paid on an illegal contract or consideration, if the Pltff. is not particeps criminis as in case of Usury Doug. 171. – 684: 467.

1 Term 266.
5 do 405.
7 do 535.
1 Term 218.
235.

It seems now settled that he is compellable to refund at all events. tho' the contract is executed.

7 Term 535.

Money paid for property to which the vendor had no title may be recovered back in an action of Indeb. assu.; or an action might be brot. on the case, on the implied warranty. —

Tha 406.
1 Term 363.
5 Term 716.

For money paid under a void authority, if in some case for money paid in pursuance of a judgment of Court Indeb. Assu. lies. – But in the last case Indeb. Assu. lies not on the ground that the judgment was iniquitous, but by reason of some circumstances attending the judgment or some subsequent event rendering it inequitable for the Deft. to retain the money. —

2 H. Bl. 469.
416.
1 do 665.
4 Term 482.
267.
Burr 1005.

The case in Burrow, Moses vs Fairland has been questioned. —

H. Bl. 414.
7 Term 268.

If a debtor at Beaufort deliver money to J.S. to convey to his Creditor at Savannah, & J.S. does not deliver it, can the Creditor maintain Indeb. assu. against J.S.? Cowp. 30. W. 35. Burr 2280. —

Esp. 576.
1 Vent. 318.
552.
1 Bar. 242, 5.
5 do 560.
B. N. P. 36.

It is laid down as a general rule that the Pltff. cannot sue in one kind of action, when he has a remedy of a higher nature. When the object in both would be the same, that rule holds, the lower being merged

Plead. Crown 219. 228.

in the higher remedy, but when the object is different the Pltf. may resort to either remedy.—

If money has been paid on a contract written or unwritten, for an act to be done. Indeb. assu. lies for money paid in disaffirmance of the contract, or an action for damages in affirmance of the contract, for warranty is not triable in Indeb. assu.—

7 Term 181. Cowp. 118. 1 Term 135.

In this case the consideration fails. This rule first branch does not hold, when the express contract is still open.—

1 Ford 363. 2 Term 369.

A contract must be disaffirmed if at all, to to

1 Term 227. 7 Mo 2 Ot. Sha 913.

If a greater sum is demanded than it was pledged for & paid, the surplus may be recovered by Indeb. assu.

While money paid by mistake is in the hands of an agent Indeb. assu. may be brot. against him, but not after it is paid over to his principal.— Bl. Rep. 824.

Cowp. 197. Burr 1984. D. Ray 1210. 4 Term 462.

Can the action ever be brot against a known agent?—

Burr 1984. 2637. 4 Term. 553. Cowp. 565.—

A mere knowledge of the existence of a debt if it be accompanied with a refusal to pay, lays no foundation of an action of Indebt. assumpsit

6 Term 187. Cro Ch 340. Cro Ch. 67. 240.

A bare acknowledgment is never evidence of the existence of a ~~debt~~ promise. If money has actually been received to the Pltfs use, & not accounted for, an action for money had & received ~~stated~~ generally is good.—

In special assumpsit, proof of a promise differing, ~~the~~ tho' slightly from the promise will not

4 Term 314 687.

support the declaration. 1 Term 447.

Bum 1354. 2 Term 370. Cowp 446. 1 Wil. 645. The rules which govern cases of Indeb. assumpsit are principally of mere equity, if any equitable defence is good.

in a count on an insimul computasset a special promise by the Deft. may be proved

Esp. 99. action for money had & received lies for money

Bl Rep 828. only. — See Page 234 as to choses in action

12 L. 69. Cowp 119. — Does it not lie for Bank Bills? — 1 Wil. 239.

See Gilb. C. Where money is received under a void authority & paid over to the principal — 4 Burr 1986

1 Ray 742. 352.

Pleas to an action of Asst. of matters coeval with the contract

I. Insanity may be pleaded or given in evidence under the General issue. It is a general rule that in actions of Asst. anything which goes to defeat the right of recovery in the Pltff. may be given in evidence under the general issue. —

II. Coverture. —

III. Infancy. In an action brot. on ~~contract~~ covenant

4 Term 77. running with the land against the heir of the lessor infancy is no plea in bar. —

IV. Impossibility of performance appearing on the face of the declaration is a good defence on demurrer. But if the impossibility does not thus appear, it must be specially pleaded

V. That the contract is idle & nugatory, or is illegal,

is a good plea to this action. —

VI. Duress may be pleaded in bar or given in evidence under the General Issue —

VII. The want of consideration, or that the consideration is past, may if the act be covered under a specialty, other than a contract executed, as bond, be given in evidence under the general issue. But if it appear upon the face of the declaration Demurrer is a good plea. — This is in case of executory contracts. Is this a good defence as between the immediate parties in case of a specialty? The meaning of the plea of non-assumpsit is not that the Deft. never promised; but that there is no duty binding upon him at the time of the pleading. —

2 Bl. Rep. 143. Doug. 108. 111. 112.

Formerly "not guilty" was holden a good plea in Asst. as a general issue; but now it is not. —

4 Bar 58. 84. Str. 1122. Cro Eli. 470.

The nil debet is not a proper general issue, yet it is cured by verdict for the Pltff.

1 Sam 462. 1 Bl. R. 647.

It is laid down in 1 Salk 22 that the excess of principal & interest paid upon an usurious contract cannot be recovered back. — not law. — Says the Judge the action of Ind. Asst. is the only to be brot. to recover money where the transaction excludes the idea of a contract. — as where money is obtained thro' extortion, or by fraud &c. There are divers cases. —

Comyn 199.

Contracts.

Pleas to ags.t of matters arising subsequent to the contract.

I. The Stat. of Limitations.

Esp. 262. 5 Ba. 65. 61. Salk 278. Carth 387. By the Stat. of James 1st called the Stat. of limitation, it is enacted that no simple contract shall be binding in law after 6 years standing.—

But the remedy only is taken ~~away~~ away the debt continues. 3 Bac 157.

Burr 2 630. 2 Roy 380. 420. 747. 1101. Gilb L Ev. 126. 7. 7 Dang 629. 2 Vent 170. Carth 471. 6 Mod 426. Salk 29. Burr. 1099. 2630. Bro. C. 385. 1 Lev. 110. 1 Sam 760. 6 do 189. 7 do 182. Cro Ca. 114. 760. 381. 404. B. N. P.

It is a question litigated whether a contract upon which the Stat. of limitations has run can be so revived by a subsequent promise of performance, as to lay a foundation for an action, or whether the suit should be brot. upon the new promise.— The decisions upon this question have been various. But according to the latest adjudged cases, the action may be brot. on the original contract.

Mr Reeve supposes in cases of this kind that the subsequent promise operates merely as a waver of the advantage which the deft. might take of the Statute, but that the Pltff. is at liberty to ground ~~the~~ his action upon the subsequent promise if he pleases.—

Various opinions are entertained as to the ground on which a debt is taken out of the Stat. of limitations. Some eminent lawyers are of opinion, that the debt is taken out of the Stat.

on the ground of indebtedness: but this cannot be the case, for when one acknowledges a debt but refuses to pay it, the debt is not renewed Gilb. 126. 127.

2 Sum 762. 6 do 193 Gilb L. Ev. 410.

But if there had been a bare acknowledgment without a refusal, the debt would have been taken out of the Stat. — promise by a servant will take the case out of the Stat. as against the principal

Esp Ca. 5 10. note

The acknowledgment of the debt is evidence of a subsequent promise 5 Mod. 426. 6 do 110. Carth 470.

Bum 1099. Cowp 548.

It is the opinion of others that it was the intention of the Legislature to bar all debts on the presumption that they were paid.

If this were here no ~~acknowledgment~~ advertisement to discharge his debts, by a debtor, or devise giving property for the payment of his debts would revive a debt once barred, which is the case

Cowp 548. 3 Ch. 484. Esp Merc. 708. 2 Burr. 1099

The true ground Mr Reeve supposes is that of waver, for what amounts to a waver see D. Ray. 428. 1101. 2 Sum 766.

Gilb. 126. 6 Mod 310. 2 Show 126. 2 Vent. 151.

A contract is waived by the act of one of two joint debtors payment of part, or a promise by one, or acknowledgment.

3 Sum 454. 4 do 419. 2 Vent. 557. ex. Ca. Esp 162. 2 Ch Ca 340.

The Stat. of limitation begins to operate on simple contracts from the time at which the right of money arises.

There is a proviso in the Stat. of limitations that operates in favor of Femes Covert, Infants, persons beyond sea &c But Mr Reeve supposes the right of the persons thus excepted, would not be affected by the Stat. if there

3 Mod 312. 1 Sid 415 1 Lev. 91. 4 Sum 300. 17 Ves. 134.

was no proviso —

But notwithstanding the proviso if the Stat. begun to run upon a contract, it cannot be taken out of the Stat. in favor of the persons excepted in the proviso —

4 Term 419. If one of several joint Creditors is within the realm, the Statute attaches tho: the others are abroad

There is some contradiction in the authorities as to the question whether the Stat. affects an Indeb. Asst.

2 H. Bl. 562. or not. The rule however appears to be thus, If the indeb. asst. is founded upon contract, the Stat. extends to it otherwise it does not. —

If the Indeb. Asst. be for a penalty imposed by the bye laws of a corporation, it is not affected by the Stat.

The Stat. does not affect a running account when the demands are mutual and Creditors of credits fe have been given within the time limited 6 Term. 189. 139. —

A title to lands cannot be acquired ~~if~~ by ~~the~~ any length of quiet possession, if such possession was founded on a mistake of the parties in making partition

The Stat. does not operate when the contract is an implied trust. 2 Vent. 345. —

A declaration counting on a promise to Pltfs testator, on which the Statute has run, is not supported

6 Mod 312 by proof of a subsequent promise to the Pltf himself. —

Penal Stat. giving part of the forfeiture to the prosecutor & part to

2 Saund 63 a the public or the whole to the public, may be given in evidence 2 Saun. 63 a

1 Atk. 525. No Eqr or Lawr is obliged to take advantage of the Stat. of limitations
Salk. 154

The principles of Law as to property's being vested in the Vendor or vendee on a sale, & at what time it vests.

3 P.W. 186 On complying with an order, by delivery of the articles to a
1 Atk. 248 carrier, the property so far vests in the person by whom they
8 Law 380 were ordered, that, in general, he alone must bear any loss
1 do 65 that may happen. The consignee therefore must bring the action. This case, however, is to be distinguished from those
5 Bur. 2680 in which the consignor proceeds against a carrier, by way of assumpsit, on the agreement to convey and deliver.

The general rule is that, ~~that~~ delivery to a carrier in the usual course of ~~his~~ trade, or to any one particularly nominated
Comp. 294 by the consignee, is a delivery to him. This howeve will not prevent a vendor, who actually takes upon himself the delivery of goods to the vendee, from standing to all risks of conveyance. Acts which might in common acceptation
6 vo 235 amount to a delivery may be so qualified by express terms as not to be tantamount. 2 H.B. 316.

As to the Law where the bargainee has the refusal until a
1 Roll. 449 certain period or is to purchase upon certain conditions see 3 Ch. 653.

Contracts.

II Accord and satisfaction.

Cro. J. 354
650.
6 Co. 44.
10 Pow. 426.
Yem 492.
Fost. 145.
4 B & C 634

Accord & satisfaction agreed upon between the parties, giving & the party injured is when performed, a bar to all actions on the accident.

Accord & satisfaction cannot be pleaded in bar of a bond, when the right of recovery grows out of the bond itself, independently of any collateral matter, tho. it is a good defence against an action but to recover damages as a compensation for the non performance of the condition.

According to this rule it would seem that accord & satisfaction is a good plea to all other than single bonds.

4 Bac. 84.
Gilb. 192.

It is said that the Deft. may plead accord & satisfaction of the money due on the bond itself.

Accord ~~by way~~ made before a right of recovery has attached, may plead in bar of an action grounded out of the Bond itself.

A title to land cannot be affected by an accord.

I. The satisfaction must appear to be full & ample, or at least the contrary must not appear; therefore a payment of a less sum of the same species of property in satisfaction of a greater is no satisfaction & which can be an action unless the time, place, or other circumstances are altered.

in favour of the creditor.

Any compensation of which the value is not self-evident, less than the sum due, may be a full & ample satisfaction, if given & received as a satisfaction. But when the thing which is due, & that which is given in satisfaction for it, are of the same species, the difference in value, if any will always be intuitively certain or evident. When they are different disparity in value is not regarded.—

2 Wils 86 The equity of redemption or any other mere equitable claim, as it is of no value in contemplation of law, cannot be the consideration of an award for a legal claim.—

II. The satisfaction must be valuable. Court will not
1 Rol. 128 4 make enquiries into the value of the articles given in
9 Rep. 79. satisfaction
Co Lit. 212.

III. The satisfaction must be certain, for if it is left uncertain by the parties so that it will not amount to
1 Salk. 126 a binding contract by and between the parties, it is not good even after acceptance—

IV The whole satisfaction must actually be received in
2 Ray. 122. order to bar an action. Tender of the the thing agreed on
1 Rol. 129.
Sta 426. as a satisfaction would not bar an action. Great in-
571.
9 Rep. 79. conveniences may arise from this rule, where the
Bro Ch. 183.
2 Term 27. award is executory.— 2 Ray. 450.
5 do 142.

When the award is so formed as to be in the nature
Sta. 571. of mutual promises, it has been adjudged to be
2 Ray 450.

binding without acceptance

An award to give or perform any thing at a future time, is no bar to an action before that day arrives, for at the day the creditor ~~may~~ might if he chose refuse the satisfaction.

2 H.B. 319. 9 Co. 79. Co. Ed. 304. If part of the award has been executed & the residue tendered & refused, it is no bar.—

In a plea of award &c it is necessary to state that the satisfaction stipulated for, was given and received

In Strange 426 it is said that giving a note for five pounds cannot be pleaded as a satisfaction for fifteen pounds. but it is said this case has been repeatedly denied to be Law See 2 T.R. 26 & 28.

A negotiable note or Bill of Exchange has been held in the B. R. an extinguishment of a simple contract debt. the Deft being liable to pay the money to a third person—

2 Bar 290. note — 1 do 281.

III. Awards.

Arbitration, is the order or determination of one or more person or persons
1 Wilson 1. mutually chosen by the parties in variance as judges to
1 Rol ab. 251. decide on the matters in controversy, which order, determination or decision is called an award is final:
& those persons so chosen are called arbitrators.

2 Bl 317. 2 Roy 122. A mere award is not a ground of action.—

Upon Eng. principles an award can never pass a title to lands; even if a deed is to be delivered as an Escrow to arbitrators to be given up to the prevailing party, no title would vest by the delivery since livery of seizin is absolutely necessary to convey lands. & this cannot be given by arbitrators.—

But arbitrators can award the conveyance of lands, & if the party against whom the award is made does not convey, his arbitration bond will be forfeited.—

If the old duty, that is, the right of recovery on contract in one of the parties is superseded by the award, & a new one created, it is generally the case that no action can be had on the original contract or tort.—

Yet in cases of this kind the old cause of action is not in any instance so completely extinguished as to be incapable of being revived. For when a mere

duty is rescinded by an award, if no obligations have been given to abide by it, so that the parties have nothing on which to rely except the award itself; recourse may be had to the original cause of action, unless the award be performed at the day appointed.

But if the award itself creates no right of recovery, as if it enjoin the making of a conveyance, release &c. resort may be had to the original cause of action.—

If bonds are given to abide by the award, no resort can be had to the original contract or cause of action.

Hyd. 192.

With regard to Bonds submitted to arbitrament, the same rules are adopted as are mentioned already under the head of accords &c.—

2 Wh. Bl. 31.

According to Eng. principles no evidence can be admitted to prove payment of a bond, unless the evidence is of as high a nature as the bond itself, an award therefore would be nugatory.

Arbitrators have all the judicial powers of a Court of law, & of a Court of Chancery, & in some particulars more than both, they give damages on award & special performance of a contract.—

The Court of Chancery does not except in very special cases decree a specific restitution of personal Chattels, yet it is not unommon for arbitrators to decree such restitution; & the award vests the property of the Chattels so completely that trover might be brot. against the person refusing to restore them. Query. If this rule

is consistent with that which declares that when bonds are given to abide recourse can never be had to the original cause of action. The preceding rule Mr Reeve supposes does not hold where bonds have been given to abide. —

Arbitrators have the powers of a Court of Chan. in procuring evidence, except that they cannot compel the production of papers. —

Criminal & Matrimonial causes cannot be settled by arbitration. Neither can they settle the title to lands, or a dispute growing out of a bond only. —

A submission to Arbitration may be

I. By parol; in which case an action of debt may be
Hyd. 7. 191. brot. on the award. Or an action of Ass. on a promise
contained in the submission, provided that the award
Ld Ray. 248. is of a sum of money. — But if the award is not for a sum
of money, an action lies on the promise to recover damages
for the non performance. —

If two persons having distinct interests, make a
submission on one part & promise jointly & severally to
Fern 352. perform the award, tho' the award against them be several,
they are jointly answerable on the promise for
the whole

II. Bonds may be given to abide the award in which
case an action lies on the bond for non performance —
If the time limited in the bond for making the award

be enlarged by parol, if the award be made after the time
5 Term 5-92. first limited, but within the enlarged time, no action
for non performance lies on the bond.—

The obligor in an arbitration bond is completely dis-
charged of all obligation by tender & refusal.—

III. The submission may be by a written agreement, in
which case an action may be maintained on the covenant,
& if a sum certain be awarded, an action of debt lies to
recover it.—

IV. The parties may by Stat. 9 & 10 Wm. 3 make
7 Term 79. 8 do 82. their submission a rule of Court.—

In this case an attachment will issue for contempt
against the party refusing to abide by the award, or an ac-
tion may be had on the bond.—

A parol submission cannot be made a
1 Term 1. rule of Court.—

If an agreement enlarging the term of ma-
king an award does not contain a consent that it
shall be made a rule of Court, non performance of the
award made after the time first limited, will not
subject to an attachment.—

The principles of the civil law have been grad-
ually interwoven with the old com. Law respecting ar-
bitrament.— So that this title of the law has under
gone an almost entire change—

Thus the ancient and modern authorities are ex
tremely contradictory—

Awards.

When a submission is by parol the submission may be with or without a consideration. In all the cases if a sum of money was awarded debt always lays to recover it.

Hyd. 7:90
Wray 248.

If a collateral act was awarded, anciently there was no remedy to enforce it. Afterwards it was established that if there was a promise with consideration to abide, the award respecting a collateral act might be enforced; but if there was no consideration for the promise the award could not be enforced.

5 Mod 35.
Wray. 960.
1039.
Salk 76.
Hyd. 9:90.

At a later period the rule was, that if there was a promise to abide, tho' without consideration, the award as to collateral acts might be enforced. But now if there be a mere submission tho' there be no promise to abide the award may be enforced.

The law is the same where the submission, if the writing is under seal, it is a ~~covenant~~ covenant, & the remedy is somewhat better.

Where bonds are given, the submission itself may be either written or parol.

Bonds are sometimes given to an arbitrator in his own name. They may also be given by third persons.

Hyd. 8
Com 100.

Respecting agreements between merchants on entering into Co. to submit to arbitrament &c.

2 Bro Ch 336.
Hyd. 98.

A testator cannot oblige a legatee to submit to arbitrament. Nor can a third person in any case lay another under such restraint.

10 Mod 59.

Awards.—

Persons submitting their claims to arbitrament, may restrain the power of the arbitrators within such limits as they please, as to award according to law &c

But when the submission is general & unqualified, the arbitrators have the extensive powers before mentioned.—

Some ~~time~~ period of time must be fixed within which the award must be made.—

Where a party ~~indebted~~ owes money to another, & consents to pay over that money to a third person, the latter can maintain assumpsit for it 4 Esp R. 204.

Bl. R. 1269. 820.

An action for money had & received will lie in favor of such third person against the debtor if money has actually been received by him of his creditor 1 H. B. 239. 243.

1 East R. 103
8 J. R. 595.

Awards.

The Revocation of a Submission

A submission to arbitrament ~~by either~~ is revokable by either party at any time before the award
Hyd. 16. is performed. Lucas. If the party revoking knows what the award is? A suit at law cannot be withdrawn after judgment is known.

Suppose the submission be by rule of Court, can it be revoked?
Hyd. 17.

8 Rep. 80 If the submission is by parol the revocation may be also by parol. —

If the submission is by writing, the revocation must also be by writing.

Mr Reeve thinks that in Connecticut a written submission may be revoked by parol.

The party revoking forfeits his bonds if any are given, & the whole penalty is forfeited. —

In cases of a parol submission, & a parol revocation, there being no bond given, nothing could be
Hyd. 18. 1 Sid. 281. recovered according to the old Com. Law.

But in some late case it has been determined that an action on the case will lie to recover damages for the breach of promise. —

Hyd. 19. Refusal to abide by an award, under a submission made by a rule of Court, is a contempt of
7 Term 73. 8 do 87. 37. Court & punishabl as such.

Awards.

8 Term. 139. 1 Wils 129. 2 Atk 569. 2 Bro CC 336.

If a contract of any kind is made with an agreement that if any controversy happen respecting it, that it should be referred to arbitration. This is no bar to either party's suing at Law or Equity. 2 Ld Ray 606.

Hyd. 248. 1 Bar

A submission is pleadable in bar to a suit brot. on the original cause of action, before the day ~~fixed~~ fixed for making the award. Can this be Law?

Persons capable of submitting to arbitrament.

Those persons who cannot contract are incapable of submitting to arbitrament.

Salk. 207. 3 Lev. 27. Hyd. 23.

Formerly one bound for an Infant who submitted to arbitrament might ~~have sue~~ avoid the bond. But the bond is now good.

The submission of one Ex^r was formerly ~~good~~ void, but it is now good.

But if the Ex^r obtains by the award less or ~~obtained~~ lost a greater sum than he would have obtained on the former, or lost in the latter case at Law, he shall be answerable for the deficiency in the one case, & for the surplus in the other.

Com. 318. 1 Term. 691.

If an Ex^r do submit to arbitration, & the award is that he pay a sum certain, he cannot afterwards avoid the want of assets.

1 Term. 691. 5 Ay 6. 7 Ay 433

An Eng. Stat. enables the assignees of a bankrupt
Hyd 23. with the consent of a majority of the Creditors present
1 Atk. 91. at a meeting legally warned, to submit to the arbitrament.

2 Mod 218. The submission of one partner in trade does not bind the other.—

Hyd. 25. If a number of persons agree to submit
Dyer 216. 6. & empower A & B conductors of the business, the the two finish all.

If in a submission one is bound for another, the principal must as in other cases answer
Hyd. 25. 108. for the acts of his agent.

Formerly all actions in which the party was to
Co. Lit. 60. wage his law, died with the party himself. But
2 Ray 248. Ex^rs & ac are now liable to a debt on an award made on a parol submission by his testator or intestate

Tho a bond is not arbitrable, yet a bond to a-
6 Term 43. bide by an award to be made respecting a bond, is forfeited by non compliance.—

If in case of a bond to arbitrament, the submission is by parol, yet an action on the case lies for non compliance

When a right of action arises from some default or injury subsequent, coupled with the bond, the controversy may be settled by arbitrators.—

Awards.

Who may be Arbitrators.

All persons except Lunatics, Idiots, persons of non sane memory, Infants, & persons attainted of Treason or felony may be arbitrators

1 Bac 137 May not Infants & Femes covert be arbitrators

4 Mod. 175 Persons interested in the controversy or even the par-
2 Vern 100. ty himself may be an arbitrator if appointed

1 Mod. 175. An umpire is one who is appointed to make an
2 Vern 100 award, provided the arbitrators cannot agree or neglect to act.

A single arbitrator is called an umpire.

1 Mod 175. Formerly if the power given to the arbitrators & the
Ray. 187. umpire was so expressed as to import a jurisdiction
215. in both at the same time; the whole proceedings were
2 Saund. 129. void, whatever the apparent intention of the parties
Com Jones. 168 might be.

Or if the appointment of the umpire was referred
Jones 168. to the arbitrators, & the appointment was made a moment
3 Keen 387. before the others authority expired, the consequence
Salk 71. was the same. But now if the arbitrators are vested with
2 Sem 645. the power of appointing an umpire, they may choose dur-
2 Mod 169. ing the period fixed for their award, if the period in which
Ray. 222. the umpire is to decide is the same or not — so that the
1671. powers of arbitrators to ~~that~~ choose an umpire where
Hyd. 53. such power is given, continues till the expiration of
56.
2 Mod 169.
2 Vent 113.
Salk 70.

of the time in which the umpire is to make his award.

Hyd. 58. If a person named umpire refuses to act they may appoint another.—

Salk 70. 2 Ray 922. 3 Lev. 263. 2 Vent 113.

The arbitrators cannot decide part only of the controversy submitted & permit the umpire to decide the rest, unless the parties so direct.—

Hyd 64.

In case of a submission to three persons an award

Hyd. 67. by two of them, a majority is not good unless the parties specially agree that the decision of the majority is good, for the Law considers them vested with a joint authority.—

And even if the parties empower a majority to

Barnes 57. make an award, still if all are not present a majority cannot act, unless those who are not present wilfully absented themselves.—

Co. J. 315. The award respecting all the matters referred

Hyd 77. to arbitrators, must be pronounced at once.—

Arbitrators cannot reserve to themselves any authority to do any future act, or rather to make any future

Palm. 110 146. Hyd 78. 12 Mod 139 2 Rol R 214. Co. J. 315. Cro J. 218 Co. 218.

decision after the award is pronounced.— It was formerly question what such a reservation of authority would have, but it is now settled that if the subsequent matter of the reservation is within the submission the award ~~reservation~~ is not void, but if it is not within the submission the reservation of authority is void, & the awards is good.—

The ordering of an act merely ministerial to be

done by the arbitrators themselves, or by others under their directions, or that of another after the award is pronounced, does not vitiate the award, such an order not being considered as a delegation of their authority.

Hyd. 81. 83. 6 Mod. 195. 2 Atk. 501. 519. 515. Ball. 48 Bro. 126.

The award that one should pay the costs of the action, an amount of having been submitted, does not include the costs of the arbitrators.

2 Ch. Ca. 223.

If the arbitrators award that one party pay costs, without defining what costs, they would be understood to mean mere legal not equitable costs. — 4 Term 645 — 3 Ar. 139

Hyd 88. 101. 2 Atk. 519. Salk 75 Com. 330. Str. 1025.

Arbitrators may award costs without any express authority in the submission. 5 Term 644.

The award must be conformable to the submission. There has been much dispute in determining what ~~has~~ is within & what is without the submission. —

It was formerly holden that if A & B should submit all suits, or all actions, causes of action would not be included. So complaints were holden to mean personal things only. — 2 Mod. 303. Hyd. 93.

But whatever may be the words of the submission, if the parties, by assent, bring before the arbitrators, & in fact submit to them any controversies & an award respecting them is good. —

If a controversy respecting lands be submitted to arbitrators, the arbitrators may award money or any thing else in satisfaction of the claim. —

2 Ray 1139. 6 Mod. 221.

So much an award not immediately affecting the

lands was void.—

So in cases of personal disputes. It is now settled
1 Ld. 12. that any collateral thing may be awarded in satisfaction.— Formerly nothing but money could be awarded
Ryd. 94. in such cases.—

An award that one party shall give a bond to secure the sum awarded has been adjudged good, tho' the arbitrators were empowered to award satisfaction merely.—

A direction that the parties should
Ryd. 96. set their seal to the award was also holden good.

If partners in trade refer all matters in dispute
Ryd. 98. to arbitrators, they have of course power to dissolve
Bl. Rep. 475. the partnership.—

Their power to dissolve the connection between Master & Servant the same.—

The words all matters in dispute in the cases
Ab. Ch. 118. between the parties, comprise only the dispute a-
2 Ven. 645. 3 do. 626. rising out of the matters specified.— Care is ne-
1 Ath. 91. cessary in wording the submission.—

It was formerly held that an award, that
10 Mod. 101. one party shall defray the expences of measuring land is good, it being in fact but part of the costs.—

An award respecting a bond given subsequent to that of the submission, is good; it being virtually the same as an order that any collateral thing

should be paid, or given up. —

Formerly an award directing a release of all demands, to the time of the award, was adjudged void; on account ~~that~~ of the possibility that some demand might have arisen between the time of submission, & the time of the award. — But now such an award is good unless the party wishing to avoid it, actually shews that some controversy or demand had in fact arisen in that period. —

10 Rep. 132 Hyd. 165.

But if such party should have signed a release in this case, not knowing of some private injury which had really been done to him by the other party between the submission & award, Mr Reeve supposes by pleading the whole matter he might avoid the award. —

An award directing any thing to be done by or to a stranger was formerly void in all cases. — But the rule afterwards established was, that if the act awarded be done to a stranger appears beneficial to the prevailing party or if the act directed to be done by a stranger is one of which the party against whom the award operates, can compel a performance, the award in either case is good. —

6 Jam. 77. Hyd. 103. 125. 104. 2 Roy. 123 Salk. 74.

An award that one party shall make a payment to such person as the other shall appoint is good.

The award directing an act to be done to a third person is now prima facie evidence that it is beneficial. So that to avoid it, it is necessary for the party who would take advantage of it to shew that it is of no advantage to him.—

The unsuccessful party in this case has no cause to complain — for it is immaterial to him whether he performs the act awarded, to the party or to any other person.—

As to an award directing an act to be done by third persons, the rule still remains as stated above.—

If an award is to be made where there are several persons interested on the respective sides; the arbitrators
Byd. 104 may award according to the rule laid down between two or more of them. — Quod vide.—

According to the old rule of Law an attorney submit-
J Ray 246. ting to arbitrament, for his principal, bound his princi-
1 Wils. 28. 58. pal only. — tho' he may bind himself now if he names
Byd 25. himself as obligor.—
26. 108. 109.

If an award orders a release of all claims by one who is trustee of the bond, for the use of another, this
Finch R. 180 bond is not included in the award unless it was
144. itself the subject of the controversy.

If the parties submit all controversies to arbitrament with an ita quod if one controversy only is de-
3 Rep. 98. Croke 200 355. cided, it is notwithstanding a good award, even tho'
Burr 274. there were other controversies actually submitted, provided
4 Dam 146.

no other was actually brot. before the arbitrators.—

The award in this case is no bar to actions in those which were not decided; & the fact that only one was heard may be proved by parol.—

4 Term 146.

But if in case of such submission more controversies than one were actually brot. up before the arbitrators & one only decided, the award would be void. And in cases of this kind the presumption of law is, that there were no more than one cause submitted between the parties.— This presumption arises where all controversies are submitted and one only is decided.

Hyd. 114. 117. 120. Hob. 49. Croke 216. 1 Saund 32 & 96. 1 Freeb. 738. Croke 858.

But if the arbitrators declare that they will decide on one or more of the disputes only, the award is good.—

When certain controversies specifically described are submitted with an ita quod to arbitrament, if any of those which were specified in the submission are omitted in the award the award is bad.—

8 Rep. 98. Croke 200. 355.

If when specific controversies are submitted with an ita quod, others were decided & none of those which were expressly mentioned are omitted the award as to those which were specifically mentioned, is good unless there was an offset awarded between those which were specifically mentioned in the submission & those which were not.—

Awards.

When reference is by rule of Chancery no such distinction between cases of ita quod & others obtains. — Hyd. 122.

If specific controversies are submitted without an ita quod an award deciding a part only of the controversies is good. 8 Rep. 98. Saund. 316. Hyd. 120. Croft. 200.

And this it would seem even tho. other controversies are actually brot. before the arbitrators

If controversies between A & B on one part & C on the other are submitted without an ita quod & no controversy is brot. up before the arbitrators except one in which A & B only are interested, the award on this controversy is good, otherwise if there had been an ita quod. —

Awards.

Requisites of a good Award.

Hyd. 122. 7 Term 73 **I.** An award must not be against law, that is an award directing some unlawful act to be done is ill. 1 Sid. 12. 2 Cont. 243. An award giving a remedy for that, for which the laws afford none was formerly ill.

II. An award must be possible to be performed. For the legal import of the word "possible" fee contracts bath. Hyd. 123. Yet an award that B promise for 6 a deed or pay a certain sum of money, is good tho' it may be impossible to procure the deed, for the award is in the alternative.

III. An award must be reasonable, therefore an award that one shall serve the other, is void, for it is unreasonable, as infringing personal liberty.

IV. An award that would endanger the person performing it, in Law is void. — Upon the strength of this rule an award directing B to pay money to A. at C house was formerly void, but it is now good. 3 Lev. 153.

V. An award must be certain, tho' an award is 7 Term 73 Burr. 227 Cro. 66. 432 560. now good, tho' no time or place is fixed for performance, the time being in this case according to the Law a reasonable time, & the place, that in which the successful party is. — Hyd 82. 129: 90. Cro. 400. 903. Salk. 71. 5 Co 97: 1 Saund 84: 151: 463. —

The requisite certainty is now reduced to this rule;

if an award uncertain in itself is capable of be-
Cro Ch. 383. ing made certain by averment, it is good, Ex. gr.
Cro J. 423. An award to pay debts tho' uncertain is capa-
2 Saund. 192. ble of being reduced to a certainty. — But if
2 Ray. 934. the award cannot be made thus certain by a-
12 Mod 535. 546. verment, it is ill. Ex. gr. an award to pay what
Ryd. 90. 133. 5. is reasonable. — 2 Keeb. 670: 92.

VI. An award must be final, by this rule is meant,
Hob 903. an end must be put to the identical controversy
1 Sam. 73. 6 Mod. 232 submitted. —

VII. An award must be mutual; formerly an award
was not good unless something beneficial was awarded
Hob. 49. to both, at a later period the rigor of this rule was
2 Ray. 246. relaxed, & then it was adjudged that it was not
Cro Ch. 354. necessary, for something to be awarded to both sides,
1 Lev. 132. but it was still required that if something was award-
ed to one party, the particular thing for which the
award was made should be formally specified. —

The former part of this rule is now wholly discontinued,
Com. 328. & as to the latter, it is presumed that an award
made on the submission of any controversy, is intended as a satisfaction of that particular injury out of which the controversy arises. —

Formerly when several controversies arose & were all
1 Rol. R. 362. submitted, and an award was made "that all con-
2 Ro. 192. troversies should cease", the award was void,
Cro C. 663.

because there might be other controversies subsisting. Such an award in such a case is ~~more~~ now good. For the award is understood to contemplate no other controversies than those submitted, & no other are affected by it, notwithstanding the generality of the expression.—

Bldr. 1117. Hyd. 113, 14. 92

A release to the time of the submission is now a good performance of the award, commanding a release to the time of the award. And if in obedience to such an award, a release of all such demands to the time of the award shou actually be given, still the release would operate on those controversies only which subsisted at the time of the submission.—

3 Mod 304. 6 do 232. 10 do 201. 2 Roy 115

In some cases if part of the award is void, the whole is of course void; in others this consequence does not follow.—

It is a rule, if there is uncertainty in the award, of that part which gives satisfaction to one side, for what is awarded to the other, is void, the whole award is void also. Ex. gr. According to the Law as it formerly stood, if A were awarded to pay costs to B. & in consideration of this part of the award B. was commanded to pay £100. to A. the whole award would be void, because formerly arbitrators could not award the payment of costs, & costs in this case constituted B's.

Cro. Eliz. 77. 589. 584. Yelv. 98. 10 Mod. 201. Hyd. 168.

satisfaction. —

In some cases also when the award is in favor of one side only, the voidness of a part vitiates the whole Exgr. If arbitrators decide matters not submitted, & award an aggregate sum in favor of one party the whole is ill. — for there might have been no damages given if they had decided only those controversies which were submitted. Yet if in this case the particular sum awarded for each injury had been kept distinct from the rest, the award would be good as to the controversies actually submitted & void as to the others.

A governing rule laid down under this head, is this, by Ch Reeve. If the justness of the case is or may be affected by the award made on the controversies not submitted, or by that part of the award which is not submitted void, the whole award is bad. —

Wyd. 1. 662

But if the justness of the case cannot be thus affected, the award as to the controversies thus submitted may be good, & as to the rest void — as if what is awarded to one party is void, & that which is awarded against him is good. in this case if the party mentioned can receive the full benefit of what is awarded to him without its being actually performed, the award as against him remains good Exgr If the award be that

Day 115

B. make a release to A. that A in consideration of the release pay B. a certain sum, if the award as to a release is void, still the award as to the sum to be paid by A. is good. —

For the award itself is as good a security to A as a release.

If one party has actually received
Cro Car 318. what was awarded to him, he is bound to perform
Ryd. 177. his part, even tho. that part of the his award which was in his favor was itself void. —

Eng. Ch. 432. If one is required by an award to give a bond with
3 Leon 62. sureties, a bond in his own name only, is said to be
2 Lev. 6.
Ryd. 166. a sufficient security, if he cannot be compelled to do more. —

According to an authority in Coke, if any part
10 Rep. 131. however small of an award, in favor of one party
Ryd. 173. is good & the rest void, tho' it is all given for a satisfaction for what is awarded against him, the whole award against him is good. — This authority is denied to be Law. — 12 Mod. 587.

Ryd. 74. The dictum that if the submission be in writing
2 Ven. 240 that the award must. is not supported by any au-
Sid. 155
3 Bee. 125. thority. Palm. 109. Bun. 56. —

If indeed by the submission the award is required to be in writing the award must be in writing

Law for an award must conform to all the minute requisites pointed out in the submis-

sion is not perhaps capable of being accurately defined in every possible case. —

The general rule seems to be that if any formality which adds any solemnity or even the semblance of a solemnity to the transaction, be required to attend the award the requisitions ought to be observed, but if the required formality be properly nugatory, it may be dispensed with. —

Performance of the award. —

1 Sid. 365. 6 Mod. 34. Hyd. 131. If an award be substantially, tho' not literally complied with, it is a good performance. —

If it be awarded that a release be given by one party & that payment be afterwards made by the other, the money awarded is of course excepted out of the release. —

1 Ram. 169.

If according to the terms of the award there is to be any precedency in the performance, the party directed to perform first must on bringing an action aver performance on his part. — If there is no such precedency either may sue without such averment. —

Hyd. 182. 197.

If a person in whose favor an award is made accepts a satisfaction, different from that awarded, he cannot require any other performance. —

Hyd. 184 201

AWARDS.

Formerly payment at a day even previous to that fixed in the award was no bar to an action for non performance. It has since been allowed to operate as a good bar. —

Hyd 184.

Formerly a tender of payment after the day fixed by the award was no bar to an action for breach of the award. Such a tender if made before a right of money has attached by the commencement of a suit is now a bar. —

Hia 903. 1032. or 1082. Hyd. 188.

If it be awarded that A. lease to B. & that there be reserved on the lease £20 per. ann. & B fails to pay at the end of the year. Such failure is no breach of the award, for the original dispute is now at an end, & if A does not pay he is guilty of a breach of covenant on the lease, but not for the breach of the award. — the same would be the the consequence if a bond was awarded, & being given, were not paid according to the condition

For the learned reasoning respecting the breach of an award, that a suit pending, & a submission during the term, should cease Vide Hyd 188. Gelv. 35. Hyd. 188. —

Awards.

The remedies to compel performance of an award.

les to remedy on a parol agreement, vide ante.

Saund. 38. 2 Keeb. 126. Cro. J. 640. Hyd. 191. 203. If a suit be commenced for non-performance, the Pltf. must state in his declaration, the submission the controversies brot. before the arbitrators, the award, the breach & if it be made necessary by the submission on the award a request on his part.—

When any thing is awarded to one of the parties 1 Saund. 33. on demand, an action for non performance cannot be sustained, unless an actual demand be stated & proved.—

If the breach stated is on a bad part of the award the declaration may be demurred to.—

If breaches are assigned in more parts than one of which some are good & others void, & upon issue joined upon Hyd. 192. all, the jury find all for the Pltf. & give entire damages, the verdict is ill & judgment may be arrested. For Jenkins. 264 the presumption is that part of the damages was for breaches of void parts of the award. But if the damages for the respective parts of the several breaches were several & distinct the verdict cannot be arrested only as to the void parts of the award.— The verdict as to the breaches of the good part of the award would stand & be ill as to the rest.—

Awards.

Awards.—

As to the remedy for non performance when the submission is by bonds Vide ante.

Tender & refusal it is said in the case of such a bond discharges the obligors whole duty.—

Notwithstanding the rule before laid down, there is an case cited by Strange, in which the action was sustained on the award, tho: the submission was by bonds

Strange 923.

If when an action is brot on the arbitration bond, the Deft. after oyer pleads no award; the Pltff. cannot as in other cases reply that there was an award; so that the dispute becomes a mere matter of Law & is not to be submitted to the Jury; but the Pltff. must in this case set forth in his replication the whole award and assign the breach. But if debt is brot on the award itself, the Pltff. need not set forth more than makes for himself.—

Hyd. 192. 4 Ba. 92. 114:135. Esp. 231. Croft. 278. Roy. 94. 5 Com. 99. 2 Mod. 77. Croft. 220. Salk. 138. Hob. 138. 199. Carth. 136.

He must also state in his replication an observance on his part of every thing required of him by the terms of the submission.—

To this the deft. if he relies on the illegality of the award must demur: for the illegality if any is apparent on the face of the award. If however the Deft. intends to deny the fact that there was any award he will regain that there was no such award.—

If an award is void in part & good in part & he agst. whom the void part was made, would compel performance of the other, he must aver performance on his

Hyd. 178. 2 Co. 2 Ray. 122.

part notwithstanding the award as against him is void.—

Verdict for the Plff. & Judgment for the Defd. See Yelv. 153.

In most cases when an award is set forth by Plff. & breach assigned, the assignment of the breach ang to be in a good part of the award ang. — But if the award as against the Defd. is in the alternative of which one part is good & the other part is ill, the Plff. must assign for breach that neither part has been performed.—

Hyd. 192. 210. 204

It is said in the Common Place books that in a suit on a situation bond only one breach can be assigned in the replication. Aliter in actions on covenants. The same rule applies in all cases of a suit on a bond given as a security for a performance of any thing. But it must be taken advantage of by special demurrer.

Com. 297. Cro. E. 186. Hyd. 192. 204. 4 Bac. 131. 2 Saund. 379. 1 Bac. 134. 135.

As a simple breach authorises a forfeiture of the bond the assignment of one appears in general to be sufficient. But there can be no substantial reason why the Plff. may not assign more than one. Indeed from some expressions in Wilton there is reason to doubt whether the rigour of this rule is now enforced. —

2 Wils. 367. 273. 1 Bac. 554.

This rule is now relaxed in some cases by Stat. 8 & 9 Wm. 3.

If the Defd. after having oyer of the bond pleads performance or any collateral matter in bar he of course admits the justness & legality of the award. It is there-

Hyd. 107. Cro. E. 836.

fore altogether unnecessary in this case for the Pltff. to set forth the award.—

If the Deft. denies the existence of a legal award, he cannot afterwards plead performance or any collateral act or matter in bar, for to plead this would be a departure.

If the Deft. after oyer states the award & sets forth by averment that there was no other award, this is considered as a traverse of the validity of the award.

If the award be bad in part & good in part, the Deft. having stated it as it is, may plead performance of the good without noticing the ill part.— Syd. 166. 207.

Tender & refusal of the thing awarded are as good a bar, as the thing awarded had it been accepted, but in pleading the Deft. must aver that he is still ready to perform.— Syd. 208.

If the Deft. after oyer sets out the award particularly & pleads performance, the Pltff. may reply by setting out the whole award, & pleading that he ought not to be ~~barred~~ barred, without that there was no other award than that stated by the Deft.

If the time for making the award is by agreement enlarged after the bonds are given, neither party is liable to a forfeiture for non compliance with the award, if made after the time originally limited in the bond. 5 Term. 54.

Chancery will enforce the performance of an award for a collateral thing, when the submission was by parole 2 Term. 643

of that Court, & in case of an award for money, if the award was made under a rule of that Court or any other Court, an attachment will issue for non-performance. In other cases the parties are left to their remedy at Law.—

If by an agreement subsequent to the award, a party engages to perform what the award requires of him, Chancery will decree a specific performance on the ground not of the award, but on the ground of the agreement. Chancery will in this case as in all others refuse to compel a party to disclose a fact which would subject him to a penalty.—

2 Ban. 24. 3 P.W. 187. Ryd. 119. Pre. C. 318.

When a Court of Equity should make this distinction between a penalty & damages it is not easy to ~~determine~~ discover.—

Ryd. 223.

Awards.

The manner of setting aside awards

Str. 301. 4 Term 589 2 Atk. 155. 2 Ray 857. Wyd. 226 &c.

In Eng. a Court of Law never set aside an award on account of any extrinsic circumstances, as corruption partiality &c. the reference was by rule of Court applied to —

Will Courts of law vacate awards for ~~extrinsic~~ extrinsic causes, unless the submission was by rule of Ct.?

1 Ver. 315. 2 Wils. 149. 1 Ca. in Ch. 276. 3 Atk. 496. 529.

If therefore a reference was not by rule of Court, the award founded on the reference cannot be set aside for any thing extrinsic, except in Chancery. — Wyd. 226 &c.

2 Ver. 705. Wyd. 241. 239. Burr. 701.

A mistake in Law or in fact not appearing upon the face of the award is not of itself sufficient to induce a Court of Chan. to annul an award, if that Court will not go into an enquiry an an account made of such a mistake. But if the mistake appears on the face of the award itself, Chancery will vacate it, unless the mistake be on a doubtful point of Law. —

Ab. Eq. 364 2 do. 138.

Corruption or partiality in the arbitrators is always a ground for Chan. to interfere & set aside awards.

2 Ver. 506. 101: 351. 151.

So if any thing ~~appears~~ which renders a rational suspition of partiality apparent, Chan. will vacate an award. So for ill behaviour of the arbitrators is always a ground for Chan. to interfere & set aside awards. So at Law where the submission is by rule of Court.

2 Ver. 216. 317. 3 P. W. 362. Wyd. 238. 1 Atk. 64. Burr. 701. 7 Term 70. 73. 82. 6 do. 161. 1 Atk. 77. 64.

Award.

If any important fact is concealed from the arbitrators by either of the parties, if the arbitrators or one of them will swear that a knowledge of that fact concealed would have altered his or their opinion, Chan. will vacate the award on the presumption of fraud.

Hyd. 239.

But if the arbitrators in the case should swear that the knowledge of the fact would have had no effect upon the award, Chan. will not vacate it.

When an award is made under a rule of Court, if the arbitrators were ignorant of some important fact which could not be brought forward, the Court will on motion recommit the award of the arbitrators for reconsideration.—

Hyd. 241.

2 Sum. 781.

In what cases the Plff may sue on the original cause of action.—

Ryd. 243. 2 Ray 248. Salk 69. Whenever a new duty is created by the award, no resort can be had to the original cause of action, till after the time fixed for performance. But if one party by neglecting what was enjoined upon him, treated the award as a nullity, the other might do the same & sue upon the original cause of action. Here if bonds are given.—

2 Ray. 112. Formerly where a collateral thing was awarded, as no new duty was created, it might become necessary, if the award was not complied with, to resort to the original cause of action, not if there was an obligation created, for there was a right of recovery on the obligation. But as the law in this respect is altered, it is probable in this as in all other cases, where a new duty is created by the award, no suit can ever be brot. on the original cause of action, but each party must in case of non compliance, sue as pointed out before. Here if obligations are not given. Vide ante

Formerly when no new duty was created by the award, but the old one was extinguished, tho' the award itself could not be pleaded in bar of an action grounded on the original cause of complaint, yet the thing awarded might be thus pleaded, as a release. If a new duty was created the award itself might be pleaded in bar. Here. If no obligation was given. vide ante

Awards.

It is said that if one of two persons should pay damages for their trespass, by an award of arbitrators, the award may be pleaded in bar of an action against the other trespasser, if the award has been performed.

But the efficacy of such an award, as a plea in this case, appears to depend wholly upon this circumstance, of the satisfaction received, & not at all upon the operation of the award itself; for before satisfaction to the party injured was received & accepted, such an award cannot be pleaded in this case.—

Com. 328.

There is an old adjudication that after a submission & before an award made, neither party can recover on the original cause of action without an express revocation; the bringing of a suit not being considered as being a revocation hereof.—

IV. Tender.—

Vin. Abr. Dam. 659. 5 Ba. 27. Atha. 576. 2 Term 27. 1 Com. 156.

Tender is an offer to pay a debt or perform a duty. Tender is a good plea in bar to all actions in which the damages or demand are certain, or capable of being ascertained by an determinate rule, as in debt. So in an action of Indeb. Ass.t on a quantum meruit the market price may be ascertained. In trespass also if the damages are certain as being fixed by law, or ascertained by the

parties, tender may be pleaded. But in all actions, where from their nature damages are uncertain, tender is a bad plea. —

In Replevin the rent averred for, may be paid into Court, it being certain. 1 K. B. 24. Salk 5 97. Barnes Notes 429.

Plea that the Deft. was ready & offered to perform his contract is not good. 5 Com 89. 2 Wils 74. 1 Rol. 465. — 1 Ld. 191. 2 do 23. 6 Com 236. 254. 260.

If Deft. pay money into Court & the Pltff. notwithstanding proceed to trial & a verdict is given against him, he is not entitled to costs, even to the time of payment into Court. Aliter, if the Pltff. does not proceed.

Payment of money of money into Court is an admission, that the Pltff. has a right of recovery to the amount of the money paid in, but as to any further sum he is at liberty to contest ——— 1 Com 465.

It is unquestionably Law that if a Note is given for any thing but money, a tender discharges the note & renders it incapable of being recovered, & that the property tendered is absolutely the property of the tenderee. Note, in this case is the tenderor under any obligation to keep the thing tendered, as Bailee for the tenderee. —

But when the note is given for money, it is contended by some that the tender does not discharge it, for that the rule is sufficiently efficacious to enable the holder to recover his money by suit, & also capable of being specific, as it originally was, by 2 Com 27.

a subsequent ~~refusal~~ refusal on the part of the tenderor to deliver the money on demand.

Whereas if the Note was extinguished, it could have no efficacy, even if it could be revived by mallies ex post facto.

1 Ev. 419. 2 Ray 254. 5 Bac. 5. But Mr Reeve supposes that the Note for money is in part discharged, if the property in the money vested in the Creditor by the tender.

But the tenderor is by law constituted a Bailee to keep the money, & he is not permitted to avail himself of his plea of tender, unless he will deliver the money into Court.

It is also opposed to Mr Reeves opinion that the suit must always be brot. on the note. Whereas if the property vested by the tender in the Creditor, some other action would seem more proper.

To this it is answered that the reason for bringing the action on the note is, that the law will not suffer the Creditor to recover his money without bringing such a suit, as will lodge the note with the Court, lest at a future time, it might be brot. forward against the tenderor. Yet in cases where other articles than money are tendered & refused, the tenderee may if the articles are afterwards ~~refused~~ kept by the tenderor & not delivered on demand, sue for them in trover instead of bringing his action on the note. The reason of this diversity in the two

cases appears to be this; the tenderer of money is obliged to keep it till it is demanded by the tenderee. And as the tenderer is thus made liable to be called on, he ought to be answerable in the manner which is most for his benefit.

But as the tenderer of any collateral thing, as battle &c is under no obligation to keep the articles tendered the Law does not shew him such indulgence, for he is not liable to be called upon at all, except for his own folly in keeping as bailee articles which he is not required to keep; & if he will make himself liable, the tenderee is not obliged to sue on his note. With regard to the principal question whether the note is discharged by the tender of the money, there are no Eng. adjudications directly in point; there are however two cases in one of which, it was determined that the note drew no Interest after the tender, & in the other that a loss or depreciation in the value of the money should be borne by the tenderee.

To consider the note as reviving by default of payment on demand, tho, not altogether agreeable to technical nicety, is not absurd or unnatural as a Stat. repealing a Stat. revives the first.

With respect however to the principal question, the most rational opinion seems to be that the

~~Plea~~ Tender.—

note does not revive on a subsequent demand by the tenderee of refusal by the tenderor.— But as in this case he neglects his duty ~~by~~ as Bailee, he should not be allowed to avail himself of the discharge created by the tender, unless he continues to do what the Law requires of him. He shall not avail himself of the advantage which the law has put in his hands.—

In some few cases the tender is a good plea where the damages sought are uncertain, as in the cases of an involuntary trespass, tender of sufficient amends before action bro.t is a discharge.—

Bun. 1364. Barnes Not 281. 7 Term 59. formerly contra. Salk. 597. Stra 822. : 7 Term 54. 1 Wils. 123.

What are sufficient amends must be determined by a Jury. It is supposed in those few cases in which tender is a good plea in trespass, it is by Stat. fact by Com. Law.— Here.—

After a right of action has accrued, tender is not at Com. Law a bar to an action. (by Stat. Ries)

In Eng. any Deft. having leave of Court may bring debt & cost of ~~into Court~~ to the time of his application into Court, & it shall operate as a tender.—

It is a rule not to permit Defts to pay money into Court, unless the Justice of the case requires it.

By an old rule of law money due on a personal duty, (which ~~is~~ is defined to be such a duty as the person

bound may perform at any time during his own life)
4 Rep. 193. must be tendered if at all ~~during~~ by the original
debtor himself, & not by his Exr. or heir.—

In all other cases a tender by an Heir or Exr. is
as good as one by the testator, if it is probable that
the last rule would ~~be~~ now be disregarded

An offer to pay a debt on condition that the
2 R.B.R. 31. creditor will give a receipt for it, is said to be
1 Vern. 193. good in case of a single bond, not of a condi-
Foster 145 tional one. Query. Is it good in any case?

To make a tender good money must be actually
2 Leon. 209. tendered or offered. It is not sufficient for the debt-
3 Ao 104. or to say that he is ready to pay.
3 Term 684.

It is not necessary actually to produce the
5 Bac. 415 money, if the creditor declares that he will not ac-
Co. 115. cept it.—

Tender of more than is due is now good.—
Sho. 916
5 Co 115
If a man engages to deliver one of two things — as
3 Term 683. the obligee shall choose, a tender of one is no
Doug. 14 bar to an action.—

But if the declaration is not thus given to the
obligee, Mr Reeve supposes that a tender of one
would be good. But as to this point opinions
are contradictory.—

In Eng. any money made current
5 Co. 114. by proclamation may be tendered.

In the U. S. any current money that is

any money usually passing is a good tender

Tender of money in a bag is a good tender
5 Bam 115. for it is the tenderers business to count the money;
tender of a large amount in copper is not good,
either in Eng. or this country, it being unreasonable

It is said by the old authorities that if an insufficient sum be tendered & accepted, that the tenderee can have no remedy for the remainder. This rule is directly opposed to the equitable one adopted in the action of Lord L. Aylesf.

If counterfeit money is tendered & accepted, the
Co Lit 208.
5 Co 115. tenderor according to an old Eng. authority must
B & Re. 390 bear the loss.

Bank Notes have been considered in Exch.
5 Co. 554 as a good tender, & it is probable that they would now
Bam. 452 be considered so in Law. They have been considered as
5 Bac. 6. a good tender in Law if the tenderee made no objection because they were not cash.

If no place is fixed for the payment of rent tender on the land is good.

The two rules already mentioned as to the place of tender apply to money only.

Bulky articles, if no place is fixed for delivery
3 Bac 712
5 Dod 7. must in General be tendered to the Creditor at his
Co. Lit 211 dwelling house. In this case is meant the residence of the Creditor at the time of entering into the obligation.

Yet in some cases when the creditor has changed his residence, the tender must be made at his new abode. The rule of discrimination is this: "If it is more convenient for the debtor to deliver the articles due at the new than at the old residence of the creditor, he may tender them at the latter. otherwise he must deliver them at the new dwelling of the creditor

The obligee may direct the delivery to be made at any place provided it is not more inconvenient
5 Bar. 7 - to deliver the articles there than at the dwelling of the creditor. In some cases the obligee must be at the trouble of transporting the articles which he claims - as where the goods were purchased of a merchant at his store. - For a transaction of this kind usage directs the delivery. -

The obligee must also call on the Exr or Admr as also on public officers for payment. -

If money tendered has been accepted, the acceptor has no
5 Bar. 6. remedy altho some of it be counterfeit, or defficient in value
5 Co. 115. or altho there be not so much as it was tendered for, because it was his duty to have examined & told it, before he accepted thereof.

Tender

Tender at a time and place fixed.

3 Bac. 710. 712 Co Lit 211. Cro El. 73. If the time fixed be on or before a particular day, the last day mentioned is the legal time for making a tender. So if the time appointed be on the tenth day of, or within a month, the last day of the month following the 10th is the legal time Co Lit. 14. Yet in both of these cases if the parties meet on a day before the last the money may be tendered.

Co Lit 202. 206. Vin. Ab 624. Hob 77. 5 Leo. 104. 5 Co. 114. The time of day fixed by law for a tender, is "the utmost convenient time" which is understood to mean such a time as that the money may be counted & before sun set. Yet if the parties meet at any time of the day fixed the money may be tendered then.

4 Term 173. 174. Quere is not the last moment early enough for a tender?

If the place is fixed & not the time the Debtor must give notice to the creditor of the time when he could make payment, & if the time is reasonable a tender of the money, or an attempt to tender is Salk. 623. 624. good.

Co Lit. 24 960. 92. If neither time nor place is fixed, but money is payable on demand, is notice necessary?

If Bonds, Notes & not negotiable are assigned, it has been questioned to whom the payment

should be made after assignment.—

It is an established rule that the obligor must suffer no inconvenience from the assignment & also that the money shall not be paid to the assignor if he is a Bankrupt; it is incumbent therefore upon the assignee to render the payment of the money to himself as convenient for the obligor, as it would be to pay it to the assignor; the obligor will then be obliged to make payment or tender to the assignee.—

Moor. 137.

If A. promise B. to pay money to him to the use of C. the money may be tendered to C. But it is said if A. promise B. to pay ~~money~~ money to C. a tender can be made to B. only, and not to C.

Cro El 755.

If after tender & refusal the tenderee shall call for his money, he must demand it in a reasonable manner, the Law not obliging the tenderor to subject himself to any great inconvenience.

Tender –

The consequences of tender and refusal.

In case of a gratuitous mortgage, tender & refusal discharges the obligation as well as the right of action – for the obligation is discharged by the tender, & there being no precedent duty or consideration, the mortgagee has no grounds on which to recover. –

In cases of other mortgages, Pawns, &c the lien of the mortgagee &c is forfeited by tender & refusal, tho' the old duty in his favor still remains. –

Cro. J. 245

Cro. Eli. 755. 2 Lev. 94. 6 Co. Lit. 207. 2 Show. 129. 2 Rol. 523

If a single bill is given with defeasance separate, tender & refusal of the sum named in the defeasance, discharges not only the penal part, but the whole duty. –

The reason of the difference between a single & a penal bond, as to the effect of tender & refusal is not easy to determine. –

So in the case of a bond given where there was no existing duty – as in a submission to arbitrators by bond, tender & refusal is a complete discharge of the whole.

Cro. El. 888. Cro. J. 245. 2 Ray. 688.

In some cases a person by making a tender acquires a right – as if A. agrees with B. that if B. pays £10 on such a day A. will grant him such a farm. In this case B. by tendering the £10 acquires the same

right to the lease as if he had made actual payment & becomes Bailee of the money.

Also where a man promises a collateral thing & makes a tender of his service according to contract. In Coun.t he would recover actual damages in this case; the tenderor acquires the same right that he would acquire by performance.

Indeed it is a general rule that in all cases in which a right is acquired by tender, that the right thus acquired is as extensive as it would have been in case of an actual performance. Thus; if A. contract with B. to build him a house for £100 & at the time appointed tenders him his service & B refuses to employ him — A is entitled to the sum stipulated. — This rule of law if admitted in its full extent will operate very inequitably. —

2 Saund. 350, 352.

Doug. 689.

The manner of pleading a tender.

In pleading a tender it is not sufficient for the Pltff. to aver that he tendered "according to law" but he must plead that he tendered, "on such a day & at the utmost convenient part of the day." "The utmost convenient part of the day" need not however be stated unless the creditor was absent

2 Ray. 687. Salk. 624. Cro. J. 423.

at the time fixed. The reason of this particular is that the question of law respecting the legality of the tender ought to be referred to the Court.—

Salk. 2234. It is necessary to state the refusal if the Creditor
2 Ray. 687. was present at the time of the tender. & if he was not
Cro. C. 888. present at the time of the tender, his absence must
Stra. 458. be stated & that the Deft. tendered &c — Mod. 581.
7 Term. 139.
7 Co. 10.
1 Sid. 31.

Salk. 633. But omission to aver refusal is cured by verdict
Cro. Cl. 888. If payment is to be made on or before such a day,
7 Term. 131. it is not sufficient to plead a tender before such a day, but the day of tender must be specified. — 9 Co. 79.
Salk. 623.
1 Sid. 23.
1 Vent. 109.
Cro. C. 889.

The Deft. must also plead in case of money due, that he has always been ready & still is ready to pay the Pltff. & now tenders payment in Court.—

When the debtor after tender refuses payment,
2 Ray. 254. it would on principle be sufficient for the Pltff. to
Salk. 622. the Plea of tender, to reply that he ought not to be barred, without, that the Deft. has always been ready &c, but the uniform practice has been to reply at length the subsequent demand & refusal.

If the Pltff. traverses tender, & the issue is found
Stra. 597. against him he cannot take the money tendered out of Court; tho. Mr. Reeve supposes that he does not finally lose his demand, but that he may afterwards recover it in an action. Yet by suffering a non-

suit, the Deft. might have taken his money tendered out of Court —

If a tender is made of collateral things the Deft. must plead the time & place, but need not aver that he has always been ready &c

Tender is always a good plea to an Asst. — Har. 576. & quantum valebat

It is also a good plea to trover when brot. for the recovery of money. It has been a custom in C.B. of permitting the Deft. on notion to bring into Court collateral articles wrongfully detained.

The practice obtains in cases in which it is apparent that the restitution of the specific articles is the object of the suit rather than damages; as where an involuntary trespass has been committed — Same rule in Ch. R.

Paying money into Court is an admission of the execution of the writing on which the action is brot. — 2 Bl. 374. 1 do. 90. 4 Term 464. do. 477.

As to the mode of proceeding after money paid into Court — Vide 3 Bar — 2 Bl. 174. 3 Term 635. 3 Bar. 692.

V. Payment.

7 Lam 64
2 Ba 134.
or. 412.
Mod. 203.
408.
577.
Salk 124
Doug 930.
B. N. P. 297.

Payment of a collateral thing must be pleaded quo modo — 6 T. R. 52.

If a seller of goods takes notes or bills for them without assuming the risque of their being good, if it happens that they are not good, they are no payment.—

3 Esp. 47.
48
50.

If the holder of a bill of exchange accept of a security from, or give time to a party on the bill, it is a discharge to ~~all~~ a party liable, subsequent to him in order, but not to one liable prior to him in point of time.—

By Supreme court in the State of N. Y. if a counterfeit bill is received in payment of Cattle the vendor may maintain an action of trover for the cattle on the ground of the notes turning out to be of no value 2 Johnsons Rep. Ingley. Payment.

VI. Bonds given for the same demand

Burr. 9.

For authorities to this title see Cowp. 129 B. N. P. 159. Esp. 164. 3 Ba 134. 2 Term 479. Cro Ch. 644. 1 Pow. 219. 1 Ba 19.

VII. Release.

Co Lit 232. 1 Freeb. 956. 2 Ray. 690. Salk 575.

A release to one of several joint & several obligors is a release to all. — See opposite page. +

Otherwise of a covenant not to sue one. This is no release even to him. — Suppose a covenant not to sue one of two joint obligors.

8 Com. 168. 171. 11 Mod. 254. 2 Ray. 690. 12 Mod 551.

The term "all demands" in a release comprises debita in presenti solvenda in futuro; but does not extend to demands growing out of the covenant not broken, or to accruing profit as rent &c. Nor to arbitration bonds. — 4 Co. 70. —

Esp. 143: 307. Bro. J. 170. 300. 2 Mod. 281. Salk 327. 518. 1 Sid. 141. Cro E. 605. Cath 513.

Courts will however often confine the meaning and operation of such general expressions to the subject matter. — 1 Paw Con 377. 398. 392.

2 Ray 515. 518. B.N.P. 166. 4 Bac 285. 5 Com 335.

Co. Lit 291. 292: 5 Co 70. Cath 119. 2 H Bl. 577. 2 Ray 235. 336: 664. 2 Lev 205. 2 Bl. R. 3: 274: 1 Paw 377.

"If A. enters into an obligation to B. & B afterwards covenants not to sue A. without any limitation of time, this amounts to a release, & may be pleaded as such. — But if the covenant be temporary & limited to a certain time, this is a covenant, for the violation of which covenant is the proper remedy but it cannot be pleaded in bar." The words of Baron

1 Bac 528. Cath 64. Comb 123 124.

If the obligor of a bond, after notice of its being assigned take a release of the obligee & plead it to an action brought by the assignee in the name of the obligee, the Court will set the plea aside — 7 T.R. 664. —

1 Bos & Pull 447. 7 T.R. 670.

VIII. Bankruptcy

7 Sum 703. Daug 97. + 4 Sum. 94.

A debt accruing after an act of insolvency, or a contract made before is not affected by the act.—

Wils. 248. Bl. R. 1106.

A discharge of a Bankrupt partner under the Stat. 4, 5 & 10 of Ann. does not discharge the solvent partner.— Bankruptcy is no bar to an action of Covenant +

7 T.R. 616.

Acts of Insolvency operate on contracts only, not on Torts.—

The insolvent act in other States has been considered by the Courts in Connecticut, as a good bar to an action in this State — suppose the Creditor lived here? In the State of New York it has been decided otherwise.—

4 Mod. 1 East. 4. do: 6.

A Judgment in one State is indeed a good bar to a recovery in an action in another State for the same cause of action — But this is expressly provided for by the constitution:—

1 Bl. 123. 136.

A person whose Estate has been confiscated is still liable on his antecedent contracts.— So that the confiscation is not a good plea to actions of this kind. tho' if the estate confiscated was applied or appropriated for the payment of his debts, if was sufficient, relief may be had in Equity

1 Bl. 432. Burr 2439. 3 Bl. — 4 Sum. 123.

Bankruptcy is no ~~plea~~ bar to an action of Covenant brought, for rent accrued before — It is a good plea under Stat. 2 & 8 Geo. 2. 1 Sum 86. 7 Ch. 612.

IX. Covenants Broken.

The words Covenants, Contracts, agreements, &c are often used as synonymous 1 Bac. 526: 1 Pow. 244.

The word Covenant in its more limited sense means a covenant written & sealed Esp. 266.—

A Covenant may be created by indenture or deed. If this agreement is by indenture, it is sufficient to maintain an action against the Covenantor; it is sufficient that he has sealed & delivered it to the Covenantee, tho' the Covenantee never sealed it himself.— Covenant will lie as well on a deed poll, as on Indenture.

Esp 266
Cro Eb 212.
1 Bac 529.

The usual remedy to enforce a Covenant is by an action at Law for damages, tho debt will lie for a breach of Covenant in a deed.—

Str. 108.
B N P 167.
3 Lev. 429.

But where the Covenant is to "do something in specie" as to convey &c. execute deed &c. the most proper common remedy is by bill in Chancery to obtain a specific performance—

1 Fonb. 27. 137. 156.
1 Bac. 526.

In cases where there is an adequate remedy at Law, the party seeking redress will not be permitted to go into Chancery, that is, it is a good objection to a Bill in Chancery that there is adequate remedy at Law— If therefore the matter of the bill shews a right to damages on the Covenant ~~merely~~ only, it will not be sustained for

1 Fonb. 27. 199.
2 Bro. C. 341.
1 P Wm. 570.
1 Bac 526.

damages are not ascertainable by the conscience of a Chancellor.

But even in these cases, that is, where the remedy is in damages only, if the relief prayed for is merely consequential or collateral to a ground of relief properly cognizable in Chancery, the bill will be retained — as where a matter of fraud is mixed with the damages. — Thus if A. sue B. on a covenant at Law, & B. files a bill for an injunction, on the ground of fraud, & A. files a cross bill for relief on the covenant, the Court will retain it because the validity of the covenant is disputed in that Court, & on a head properly cognisable there; & therefore if the validity of the deed be established, the Court will direct an issue for the quantum of the damages.

2 Pow. 216. 1 Eq. ca. ab. 17. 1 Ba. 69. 526.

All covenants are divided into two kinds, covenants by deed, & covenants in law. The former are expressly mentioned or recited in the agreement between the parties. — The latter are raised or implied by law. Thus if A demise to B for a certain time, the law raises a covenant that the lessee shall enjoy quietly during this time. —

Cs. 266. 4 Co. 80. Co. Lit 384.

This division of covenants arises from the ~~form~~ nature & form of the stipulation. —

Again: Covenants are divided into real & personal. — Covenants real, are those by which one binds-

Cs. 266. 284.

Co Lit. 132 himself to pass. or of some things real as lands
5 Co 16:17. or tenements.—

A personal covenant is such as is annexed to the person, & is merely personal, as to do an act of service, to pay money, build a house &c This division is derived from the reference to the object of the contract.—

No set form of words is necessary to make
Bac 290. a covenant, any form of words shewing the concurrence
1 Bac 527. of the parties in an agreement, are sufficient. This,
Esp 267. ~~of the parties in~~ if A executed a lease to B. in these
1 Vent 10.
Bro Ch 23.
Leon 324
Cro Ch 241.
words "reserving such a rent" or B.'s "paying such a
Co Lit 141. rent" &c and accepts the lease — Covenant for non pay-
1 Ford 375. ment lies against him — It is a constructive covenant by the lessee as he accepts the lease.—

A covenant may be as to something past pres.
Plowd 308.a ent or future. The covenant is as to something past when one covenants that he has done a thing & if he has not, covenant lies against him — As to something present the case of a covenant of seizin — & to something
Plowd 308. future in common executory agreements, covenants of warranty.—

Covenants in Law differ from covenants in
Esp 267. deed, in this — covenants in deed are founded on the
4 Co 80.
5 Co 17.
words used as amounting to a covenant express,
1 Rob. ~~370~~ 519. tho' the words are not the most direct, apt & explicit —
Dye 257 a. Thus: "yielding & paying" "reserving rent" as well as

the words "covenant, agreement &c are verbal covenants, the covenant being expressed — Covenants in Law are implied, not from the phraseology but from the nature of the contract or agreement which is expressed, or from the express covenants. Thus the words, demise &c ~~&~~ import a covenant in Law that the grantor has a good title, & if the lessee is evicted, covenant lies against the Lessor. —

Carth 98. Palm. 388. 2 Mod 92.

It seems also that covenant will lie before eviction, for the covenant in the lease &c is a covenant ~~in the lease~~ of seizin, which is violated from the mere fact that the lessor granted what he had no power to grant. —

4 Co 80. Carth 98. 1 Rol. 520. Esp 267 & 268. 1 Bac. 530. Hob 12. 2 Brown 22.

But covenants in Law are restrained by covenants express — as a lease by the words, demise grant &c which amounts to a covenant that the lessor has a good title, & that the lessee shall quietly enjoy, followed by an express covenant against eviction by the lessor or any claiming under him, here the covenant is not broken by a stranger's evicting. —

4 Co 70a. Yel. 175. Esp 273. Cro El. 675. 2 Mod 92.

In one case it is laid down as the rule that if one lease to another by the words "I have granted & to farm let," covenant will not lie on eviction by a stranger. But this must mean a tortious ~~eviction~~ entry, otherwise it cannot be reconciled

Esp 268. Cro E. 214. 4 Co. 80.

with the preceeding rules. —

A recital in a deed of a former agreement creates a covenant on which this action will lie — As where it was recited that whereas it was agreed or has been agreed that A shall pay £1000 &c the deed confirms the parol agreement & intent by relation & makes an express covenant —

Esp 268. 3 Reeb. 465. 1 Lev. 122.

But in covenants in deed if the word covenant is not used, there must be words which import an agreement or the action will not lie. Thus: if the lessor for years covenants to repair, provided & it is agreed that the lessor furnish timber; this is not only a qualification of the lessee's covenant, but a substantial covenant. But without the words <u>it is agreed</u>, it would be made a condition precedent to the lessees performance —

Esp 267. 2 Com. 560.

If however A. lease to B for 60 years, with the proviso if B dies within 20 years his Exr. shall have the premises for so many years as remain, this proviso is a covenant, & not a lease, it is not in the nature of a grant or demise but of an agreement executory. Besides it is void for a lease thro' uncertainty as to the beginning & length of continuance —

10 Co. 155. Moo. 478. 1 Rol. ab. 518.

If a lessor executes a bond conditioned for the performance of covenants &c in the said deed; This

1 Bac. 530 & Co 80.

Covenants Broken

extends as well to covenants in law, as express covenants.—

A lease "provided & on condition" that the lessee does some act is not a covenant, but a condition to defeat the Estate; So where a stipulation in a deed is in the nature of a defeasance, covenant does not lie at Law.—

1 Com. 560.
1 Roll 518.
or 508.

Covenants Broken.

The construction of Covenants.

5 Leon 699. It is a general rule that covenants are to be
1 Bar 539. construed liberally, that is that the meaning of the
Plowd 140. parties is to be sought, without such strict ad-
Co Lit 45-6. herence to positive rules as in cases of deed or
Moor 408. grants executed conveying a present interest —
Cro E. 7. therefore in many instances a literal performance
1 Sid 48. will not be sufficient — 1 Bar 539. —
Esp 270

Thus: if A. covenants to deliver a Bond to B on such a day, & before the day sues B on the bond & recovers, & then delivers on the day, he is liable on the covenant. —

On the other hand a subsequent performance tho: not a literal one, will excuse the co-
1 Leon 52. venantor; thus: if one covenants that his son being
Esp 270. under the age of consent shall marry the covenantee's daughter before he obtains that age, & he does marry her & afterwards dissents, there is no breach tho: there is strictly no marriage. Yet this is not a literal performance. —

If the lessee covenants to leave all the
Esp 291 timber on the land, & cuts it down & there leaves it,
9 Ray 464 it is a breach of the covenant. —
1 Ld Ray 276.

If A. covenants to deliver a certain piece of cloth
G Ray 464. to B. & cuts it into rags & then delivers it at the time
Esp 270. 1 Bar 429: 542.

Esp. 270. this is a breach — So where the Deft. was a Brewer
Skin. 39. & covenanted that the Pltff. should have his grain
& spoils them —

In case of a covenant to pay £30. money
Sid. 150. not being mentioned, it has been generally holden
that a delivery of £30 in deposite of a collateral
article is no performance

1 Lev. 102 When the words of a covenant are uncertain
they are to be taken most strongly against the
1 Sid. 151. covenantor, & most beneficial in favor of the cov-
Esp. 170. 271. enantee; for they are the words of the covenantor,
1 Bac. 537 & he is presumed to have used those most favorable
to himself. Thus, where the Deft. covenants that if
the Pltff. will marry his daughter, he will pay the
Pltff. £20 per. ann. It was holden payable for
the Pltff's life

There are certain cases in which an exception
6 Co El. 657 in a lease amounts to a covenant by the lessee &
1 Rol 431. others in which it does not. The reason on which
1 Bac 531. Cro Th 232. this rule rests is, that where persons are agreed upon
Salk 196. a thing & words are used to make the agreement, tho'
11 Mod. 170 1 Bac 238. they are not apt & usual words, yet if they shew the
intention as to the agreement the law will give them
effect by construction, for the law always regards
the intention of the parties

Bac 1637 A distinction is to be observed between express
1640 & implied covenants in the construction

The former are to be construed more ~~liberally~~ strictly than the latter. This: if one expressly covenants to perform a voyage in a given time, he is guilty of a breach unless he performs, tho' the performance is rendered impossible by causes beyond control. —

It is a question whether if a lessee covenants
1 Fonb 366. absolutely to pay for a certain number of years,
Sha 763. if the thing demised destroyed, so that the lessee
1 Leon 310. 708. does not have the use of it, a Court of Equity
2 Roy 1477. can give relief: — one Chancellor has decided that
Esp 270. the lessee should be discharged. But Fonbland
Dyer 33. combats this decision. —

But when the covenant is implied such accidents
Bun 1639. will excuse the covenantor, as in case of waste, if the
1 Fonb 366. house be destroyed by tempest or enemies the lessee
is ~~discharge~~ excused. —

It is a general rule that the performance of express cov-
Sha 763 enants is not discharged by any collateral matter, for
Esp 270. there must be an absolute performance. — Esp 198.
Salk 198. But to this rule there are exceptions. — — — — —

If a man covenants to do a thing which is law-
ful, if a subsequent Statute makes it unlawful. —

2d. If one covenants not to do a thing which is un-
Salk 198. lawful, if a Stat. compels him to do it, the covenant
Esp 270 is repealed. So I suppose if the covenant was un-
lawful at the time of covenanting.

3d. But if he covenants not to do an act which was

unlawful at the time, a statute making it lawful does not annul the covenant. Thus a covenant by the lessee to pay all taxes extends only to such as were in being at the execution of the covenant, & not to those of another kind imposed afterwards. It is a general rule that Covenants are confined in their operations, respecting any particular subject matter, to that which is in being at the time of the making the covenant.

1 Lev 68. 1 Vent. 223. 3 Term 379. Stra. 1191.

A covenant contrary to law or good policy is void. This rule is applicable to all covenants. 10 Rev. 164: 176: Burr 2255

Cowp. 341. 729. 3 Term 17.

A covenant is implied in the assignment of every Chose in action. 1 Term 621.

A Com. Law, Choses in action are not negotiable, yet they are often assigned, & such assignment is an implied covenant by the assignor that the assignee shall have the benefit of them. 20 H. 608. If then the assignor receive the money due or release he is liable on the covenant. 1 Mod. 113. 2 Ray 683: 1242

1 Term 621. Co Lit 214. Cro E. 280. 2 Rol. 42. 1 Rev. 117. 2 Vent 540. 3 Keeb. 304.

An assignment of a Chose in action need not be by deed, & of course may be by simple contract or by parol, since there is no difference in point of solemnity between an assignment by simple contract & by parol.

A covenant not to sue a debtor for a certain time is no bar to an action. But the covenantor by suing within the time makes himself liable on the covenant. The reason of this rule is, that if the cov-

Cro Car 352. 1 Show 76. 1 Rol. 989. 3 Lev. 41. 4 Bac 265

2 H Bl 10. Rob 19. Salk 63. Salk 573 2 Raw 255 2 Ray. 187. or 137: 393: 413. — enant is construed to be a temporary release, it would be a perpetual bar, for a personal action once suspended is forever gone —

But a covenant not to sue at all is a bar — and it may be pleaded as a release. — 1 Bro 352

1 Lev 446. 4 do 170.

This rule is adopted to prevent a multiplicity of suits to produce the same effect, for if a bond-Stoi should recover he would be compelled to pay the whole bond —

1 Lev 603. 2 H Bl 603.

But a covenant not to sue at all one of two joint & several obligors, is no bar to sue the other, nor it seems to the covenantee. —

8 Lev 168. 171. 2 Ray 690 11 Mod 254

But if the obligor is only joint, a covenant not to sue one of two joint obligors, I suppose a bar as to the other, for it would seem the covenantor had bound himself against all the remedy which he might have upon the obligation — Here.

2 Ray 690.

If one grant to his debtor that he shall not be sued before such a day, & that if he is he may plead the grant as an acquittance, & that the obligation shall be void & that the debt shall be forfeited, this is a release for the grant is in the nature of a defeasance on the part of the grantor

1 Rob. 939. 4 Bar 266. Salk 64 211. Comb. 423. Hett. 619. 1 Show 46. 330. 350 2 Show 446.

Covenants Broken.

Covenants Broken.—

Covenants used in Conveyances.

4 Co 80.b In all deeds of conveyances except quit claim
Esp 266. there are two covenants 1st Covenant of Sei-
1 Rob. 519. zin and 2d a covenant of Warranty — These
2 Mod 92. covenants are generally expressed, but some-
Dye 257. times implied —

The difference of a covenant of seizin & a covenant of warranty is this; the former is a covenant that the grantor has a title. The latter is a covenant to defend the grantee against all claims. This division leads to a difference in the remedy between the two covenants. —

Esp 299. On a covenant of seizin the grantee may
Cro J. 170. sue before eviction, & it is sufficient that the
3 Bl. 60. grantor was not seized. —
9 Co. 60.

In actions on covenants of seizin it is suffi-
Cro J. 170. cient to aver that the Deft. was not seized &c
3 Bl. 60. without stating who was seized. It is then in-
9 Co. 60. cumbent on the Deft. to shew that he was sei-
Esp 299 zed &c. which puts the Pltff. to shew higher ti-
tle in another. —

But on the covenant of warranty it
Esp 301 is sufficient to shew that the grantee has not
Cro El. 917. been evicted. — this rule & the last ought
to be transposed —

Covenants Broken

Covenants Broken.—

On covenants of warranty the Plff. cannot sue till eviction. He must also state the eviction, that it was under claim of title or by lawful act; also it must appear that it was under good & clear ~~title~~—

Esp 301. 4 Co. 80. 4 Lem 617. Cro J. 315. 1 Ld Ra 36. 277.

A lawfull right & title in the evictor is not sufficient, for it might have been derived ~~from~~ from the Plff. himself—

1 Sid 466. 2 Saund 177.

But if it appear that the evictor was under older title, from the declaration it need not have been formerly stated to have been so—

Esp 302. 4 Lem 617. 2 Lev 37.

It is not necessary to state under what title the eviction ~~came~~ was—

4 Lem 614 2 Lev 37.

It is however laid down in some authorities that the Plff. must assert what title, but this is not Law. If the words "what title" mean any thing else than "good & older title, the words in these cases were "legal & good title"—

1 Saund 177 1 Sid 466.

The reason why eviction must be stated to have been under title &c is, that the ~~cove~~ covenant of warranty extends not to the tortious acts of others who are liable themselves—

Esp. 301.

Stating that the eviction was ~~not~~ by dint is not sufficient, for it might have been brought about by the collusion of the grantee & evictor & tho' the default of the grantee, & not through

Cro C. 917. 4 Co 80.

a defect of title.—

But one may expressly covenant against tortious act of third persons, and the covenants under "good & lawful title are not ~~sufficient~~ necessary.—

Esp. 373 374.

So covenant against the acts of a particular person extends to tortious eviction by that person.—

Esp. 374. Hob 36. Cro E. 212. Sta 400.

If the covenantor himself disturbs the grantee even by a tortious act under claim of title, that is, by such an act as appears to be an assertion of right he is liable on the covenant, & the Pltff. need not state that the Deft. had no title or even that he claimed any, if the act appears from the declaration to be an assertion of right.—

The same rule holds where the tortious eviction is by any person included in the covenant— as Heirs, Exrs. So even tho' the Heir is not named.— 2 Com 564. Dyer 257.

1 Rol. R. 21. Esp. 302.

A covenant by Exrs as such for quiet enjoyment against any person whatever, is restrained it is said to themselves & persons claiming under them, that is, the breach must happen by some act of the Exrs.— Quere. Is this the division?

1 Bl. 34. Shep 163.

The rule of damages in covenants of seizin and warranty is different— On a covenant of seizin the

Pltf. recovers the consideration & interest —

On a covenant of warranty he recovers the consideration & all his damages in being evicted &

On a covenant of seizin the assignee of the grantee cannot maintain an action against the first grantor, for the covenant was broken at the moment of execution, & therefore the right accrued before assignment. & a right of action cannot be assigned.

Esp 295.
Bl. C. 158.

If ejectment is brought against the grantee, he ought to notify his grantor, that he might appear and defend — Thus, when the interest is freehold it is called vouching in the grantor. —

3 Bl. —
1 Bac. 532.
Cabit. 101. 105.
5 Com. 614.

The usual mode of giving notice is by writing — But according to the Eng authorities writing is not necessary. —

5 Com. 116

Quit claim deeds, contain neither of the above covenants, yet in some cases the quit claimant is answerable for defect of title in Indeb. Ass.t. for the consideration —

The rule is, that if the conveyance was a bona fide contract of bargain, the consideration is not recoverable — If not a bargain of bargain it is recoverable — The deed itself it seems is not conclusive, that the contract was a bargain of bargain. —

If in covenant against two joint covenantors the Pltf. has judgment by default against one

3 Bl. 188.

It is afterwards barred as to the other by plea pleaded specially, or if judgment goes against him on general issue. Judgment cannot be entered against either, The verdict abates the action; for the Plff declares against the defts as being jointly liable, and as one is released, so of course is the other.—

1 Reeb. 184. Croo. 134. Cath 361.

This rule does not hold in actions on torts against two, unless a justification is pleaded by one, which shews that the Plff has no right of action against either.—

Tho' this is the usual action for a breach of covenant, yet in some cases a bill is preferred to a court of Chan. praying a specific performance of the covenant, & when proper it will be decreed.—

So the action of debt may be had for a breach of covenant, when the covenant is for the payment of a certain and determinate sum, in other cases the action of debt will not lie for a breach of covenant.—

1 Rob 591. 597. Croo. 561. 758. 3 Lev 429. Tho. 1089. B.N.P. 167. 2 Bar 15.

The rule that debt on covenant lies only when the sum is certain, connected with others, has led to analagous distinctions in the books relative to the actions which will lie on covenants to pay sums of money by different instalments. The following distinctions appear from a com

parison of the decisions to be just—

On a covenant to pay an aggregate sum by instalments, the actions of covenant & ass't will lie, & the same actions lie for damages when the first instalments become due, but debt on the covenant &c lies not till the last is due. This distinction is clearly supported by authorities.

Esp. 205. Co. 6. 118. 4 Co. 94. 8 do. 153. 3 do. 2 a. Co. 6. 175. 1 Com. 107. Dyer 103. Co. 7. 113. Co. 7. 115. Salk. 166: 3 Mod. 153. B.N.P. 168: 1 H.Bl. 547.

The ground of this distinction is the difference the actions covenant & ass't & debt, the two former lying to recover damages for every partial breach of the covenant— But the action of Debt lies to recover a sum in numbers— The latter action therefore being upon the whole covenant or contract, will not lie until there is a failure of all the stipulations.—

Esp. 172. 266. B.N.P. 167.

On a covenant to pay several sums not aggregate, action lies on failure of the first payment.—

B.N.P. 168. Co. 6. 176. 8. H.Bl. 556. Co. 6. 118.

In this case the actions of covenant & ass't & debt will lie.—

On a lease reserving rent in an aggregate sum to be paid quarterly, the actions of ass't debt and covenant will lie, when the first quarter's rent become due; for rent is an annual interest, and in judgment of law no debt exists on a covenant until the time of payment— Therefore

3 Co. 22 10 do. 128

rent for the first quarter only, is due till the expiration of the second & of course it is an entire debt, & may be recovered in an action of debt.

Esp 205. 1 Atk 118. Wms 18. Stra. 515. 814. Co J. 568 B.N.P. 168.

A distinction is to be taken between a covenant to pay an aggregate sum by different instalments, and a penal bond conditioned to do the same.—

On a bond with a condition to pay an aggregate sum at different times, debt lies for the first breach. For it is a rule of Com. Law that by non performance of any one of the acts covenanted to be performed, the whole penalty is forfeited, & therefore the whole bond which is an entire sum becomes due.—

+ a single bill is a single Bond

But the action of debt lies not on a simple bill covenanting to pay an aggregate sum by different instalments, till the last instalment is due, for a simple bill is an entire contract & cannot be severed, & as debt is the only action which will lie on a single bill, the rule will hold that no action will hold till all the instalments are due.—

1 Rol 601. Co Lit. 47. 292. 1 Co. 128

B.N.P. 168. 1 Mod. 148. Esp. 125.

In the esp last cited.— Cake when speaking of bonds, evidently means single bills.—

Co Lit 292 b. 1 Mod 548. 52.

Several of the preceeding rules as to covenants apply — to notes mutatis mutandis.— Bro C. 807.

5 a 1 Com. 86. Bro C 126 Comb 297. 2 Wms 193

In action on covenants any number of breaches may be assigned, but in an action on the bond only one may be set forth, for one breach is a forfeiture

of the whole at Com. Law.—

3 Salk. 108. 131. 4 Bac. 134 2 Vent. ~~134~~ 198: 1 Rol. 112.

From some expressions in Wilson the rule appears to be somewhat relaxed. 2 Wils. 269.

1 Bac. 644. 2 Wms. 377. 8 Leon. 126. B & R. 1111. 1016.

Also by Stat. 8 & 9 Wm. the Pltf. may assign as many breaches as he pleases on bonds in certain cases, that is, in cases of bonds, for the performance of covenants in deeds &c.—

Bac. 826. 4 Bac. 135.

But even where several breaches are assigned contrary to the rules of Com. Law, advantages must be taken by special demurrer, for it is mere matter of form in the nature of duplicity, which is not reached by general demurrer.

And assigning cause of demurrer "that the declaration is uncertain & wants form" is not special enough.—

1 Bac. 128. 2 Wms. 197. 1 Rol. 519. Dyer 74.

It is a general rule that the Exr. of a covenantor are implied in himself, & bound without being named.

But an exception is to be taken to this general rule

Cro. E. 653. 1 Bac. 533. 1 Sid. 216. 2 Com. 563 1 Rol. 519.

where the covenant is to be performed by the testator personally—

2 Mod. 269.

So the Exr. is bound even in the last case, if the covenant is broken in the lifetime of the testator.

2 Com. 568 or 564.

So the ancestor seized in fee may bind his Heir by covenant. 2 Vent. 213. Dyer. 338. a.

Thus if A covenants to sell lands, & dies before conveyance, his heir will be decreed in Chan. to convey

of the money will generally go to the Exr., especially if the personal property is insufficient for the payment of debts — This is a covenant rule —

Esp. 294. 2 Com. 561. B. N. P. 158. Co. Lit. 87.

It is a general rule that covenants real bind the heir of the covenantor, & also descend to the Heir of the covenantee —

2 Com. 561. Skin. 305. 2 Lev. 92.

The heir may sue on the covenant, tho' not named, if the covenant runs with the land and appears designed to continue after the ancestors death — as a covenant with the lessor to leave the land in repair. Esp. 294. 295. —

Esp. 295. 1 Com. 561. 1 Vent. 176. 347.

It may be questioned whether on principle the Heir is liable on his covenant of seizin, since the breach must have happened in the lifetime of his ancestor

Covenants which run with the land & contra.

Leases were assignable at at lone. Law of the covenants contained in them were in some cases binding on the assignee while he continued on the premises assigned — So in some cases the assignee may have the benefit of the covenants made of the term to his lessee, & assignee may have an action on them

The assignee is sometimes liable on the covenant of the assignor or lessee tho' not named therein, he is sometimes liable when named & not otherwise, & sometimes not liable tho' named. —

3 Lev. 238.
Dem 203.
2 Vent 228.
223.

The assignee of a lease is bound by the covenants ~~of a lease~~ tho' not named, if they run with the land.

1 Ford. 345.

covenants are said to run with the land, when the thing covenanted to be done, or concerning which something is warranted to be done, was in esse, at the time of the lease & period of the demise. The assignee of the lease is liable on a breach of such covenants happening during his possession tho' not named — as covenant to repair the buildings &c. —

4 Co 80.
5 do 16.
Cro 457.
1 Bar 634.
Esp 293.
1 Rob 521.
Dyer 13.
Moor 399

So the assignee is liable on a covenant to pay rent, which tho' not substantially, is partially in esse: this "then is a covenant which runs with the land" or is annexed to the estate". —

But by a covenant on the

1 Saw. 236.
1 Bar 634.
Cro 383.
B.N.P. 159.

Bar 1271.

lessee's part to build a wall de novo on the land,
5 Co 15. the assignee is not bound unless named, the
3 Term 393. thing is not parcel of the demise, such a cove-
Cro E. 552. 553. nant is said to be a collateral covenant which
1 Bar 534. does not run with the land. —

5 Co. 24 So a covenant runs with the land if it goes
Cro J. 125. to the support of the thing demised —
3 Lev. 521.
2 Com 564. When the assignees are named, they are obliged
3 Lev. 238 to perform all the above covenants, whether they
1 Ld. 215.
Term 303 run with the land or not — as a covenant to build
2 Vent. 228. 232.
4 Mod 91. a wall on the land &c. — 1 Bar 534. —
5 Co 16.

But the covenant in this case must be to do a thing
2 Com. 562. 4. which relates to the demise — For the assignees tho' nam-
5 Co 15. 16
Cro Jam 438. ed, are not bound by a covenant to do an act which
1 Bar 534. does not concern the demise, as to build a house
Fonb. 352.
Jones 223 upon other land, — or to pay a collateral sum; for
there the act to be done is collateral. —

But when the assignee is bound, it is only for
H B 6 171. rent incurred, or covenants broken during his pos-
Salk 699. session — If the breach was before, resort must be
Com 1271.
1 Bar 334. had to the lessee, tho' the assignee were named;
2 Ray. 888.
1 Fonb. 350 for the assignee is bound on the ground of possession,
2 Com 565. his liability rests ~~merely~~ on a privity of Estate, which con-
tinues during his possession only — as if a lessee cove-
nants to rebuild within a certain time assigned,
his assignees are not liable on the covenant —
1 Fonb 350. So the assignee is not liable at Law for a breach

Cath. 177. 3 Co. 22. Salk. 81. 4 Mod. 71. Pow. M. 90. Stra. 1221. B.N.P. 159.

after his assignment. — If he assigns the very day before rent is due, he is not liable for any part, even tho' he assigns to a beggar by fraud, unless a trust is proved. Hott. 166: 172. —

1 Vent. 329 351.

It is said in Vent indeed that "fraud may be repleaded," but this division is now overruled. —

1 Fonb. 353. 1 Vent. 165. 87: 88.

But Chancery will compel the assignee in this case to account for the rent while he enjoyed the land.

1 Fonb. 354 2 Atk. 219. 548.

Whether Chan. will in any case restrain the assignee from assigning to a beggar or a Bankrupt, is an unsettled point — But they will not restrain the assignee if he offers to surrender to the lessor & the lessor refuses to accept the surrender. —

2 Leon. 135. 3 Ac. 57: 60. Esp. 276.

A Covenant by the lessee not to assign, is binding, tho' this seems formerly to have been questioned

3 Wils. 234. 8 Leon. 579 Vent. 85. 2 Eqca. ab. 100: or 130 Dyer. 6.

Such a covenant is not broken by the lessee's creditors, taking the term in execution, nor by an under lease of part of the term, nor by devise of the term. B.R. 766.

4 Leon. 98. 1 H.Bl. 439. 1 Bar. 535. 1 Fonb. 353, 4. Salk. 199. Raph. 120. 3 Co. 22. Pow. M. 90.

The lessee is always liable to the lessor on the express covenants, even after assignment by the lessee.

1 H.Bl. 439. 444. Cro. J. 334. 3 Co. 23.

But if the lessor has accepted the assignee for his tenant, as by receiving rent of him, he cannot afterwards maintain debt for rent against the lessee in any case, the priority of Estate being gone. —

1 H.Bl. 434. 2 Cow. 563. Cro. J. 509. 532.

Yet if the covenant be express he may have the action of covenant, for in this case the priority of contract

remains. — Cro C 185. 1 Saunb. 354. Bl. R. 159.

1 Bl R 437. But if the covenant is only implied by law, the
Cro J. 522. lessor shall not have any action, even the action of cov-
1 Sid 447. enant against the lessee for any failure, after accept-
1 Saunb. 354 ing the assignee, tho' he otherwise may, such cove
3 or 8 Co. 32 22. nant being founded on privity of Estate which the lessee alone cannot destroy

18 Bl R 88. 439. The lessor may accept the assignee by accepting rent, by assenting to the assignment &c —

Where the covenant is express the lessor may pursue
4 Bar 279. his remedy on the covenant ~~on the~~ against the lessee
1 Saunb 345. a
Cro Eliz 215. 216. & assignee at the same time, but only one execution
3 Co 22. shall be extended — After satisfaction of one execution,
Cro J. 522. if the Deft. in the other is taken, except for costs —

Audita Querela lies. —

By Stat. 32 Hen 8th the Grantee of the lessor has the same remedy on covenants running with the land against the lessee &c as the lessor himself had at Com. Law. —

The Com. Law extends the remedy only to the representatives of the lessees grantee, as he had before against the grantor

Hob 405. — A distinction is to be observed between the
3 Wils 234
Bl R 766. assignee of the lessee & a derivative lessee. —

A derivative lessee or under tenant, is one
Saunb 347. 348. who takes a conveyance of part of the remainder
2 Aug 177. of the term, not as tenant to the lessee of the whole. —

A derivative lessee is not liable on the covenants in the lease, for there is no privity of contract between him & the lessor, yet he is liable to a distress, for rent on the ground of enjoyment.

The assignees of the whole term are liable on the covenant, according to the preceding distinctions
Doug. 177. whether the assignment is as actual, or by devise or by sale under execution.

If the lessee covenants for himself and assignees as long as they shall be in possession after the term, he is liable on the covenant tho'
2 Com 564 Stra. 407. not strictly as assignee.

In actions on a covenant running
4 Com 77. with the land against the assignee's heir, infancy is not pleadable in bar, for tho' an infant is incapable of contracting, yet as heir he is able to make satisfaction for a breach of covenant already made

If A. covenant with B. his heirs & assigns for
2 Com. 561. quiet enjoyment, even in a real covenant as in the
1 Vent 176. 3 Ev 97 quiet enjoyment of an inheritance, & this is broken
Esp 295. in B's life, his Exr tho' not named shall have the
2 Lev 26. action. For damages are to be recovered, & they accrued
B.N.P. 158. in B's life time, & so belonged to his personal fund

Salk 141. If a covenant real is broken after the covenantee's
Esp 295. 2 Lev. 92. death, his heir must have the action
B.N.P. 158. 159.

It is a general rule that the covenan-
2 Com 563 tees Exr tho' not named is always liable for a

306.

1 Saw. 128. 2 Ro. 197. 1 Bac 537. breach happening during the life of the Covenantor even in covenants real. Cro E. 553. Dyer 14a. 1 Rob 34. 40 519 For the right of damages accrued in his life time would have diminished his personal fund. —

Action would also lie against the Exr. tho' the Covenant be not broken till after the Covenantor's death, & tho the Exr. be not named if the Covenant be express. — This rule is to be taken with the exception of those covenants which terminate with the life of the Covenantor. —

Cro E 553 1 Bac 533

The Covenantee's Exr. is not liable for a breach of those covenants happening after the death of the covenantor, tho' the Covenant be express. —

But on a covenant in Law in a lease or grant not broken till after the Covenantor's death the Exr. is not liable. The reason of this distinction between covenants express & covenants in Law is probably an artificial one. But what it is we are unable to ~~collect~~ collect from the Books.

2 Com 563 Dyer 257a 1 Bac 533. Cro E. 157. or 137.

If however Exrs. do come into possession of the lease in their representative capacity, they may be sued as assignees for breaches during their own possession

Exp 296. 1 Wils. 4. 2 Salk 309

The Heir of the Covenantor, if named is liable for breaches, arising either before or after the covenantor's death, if he has real assets otherwise not. —

2 Com 564. Exp 294. 1 Forb 367. Co Lit. 365 371. 373. 384.

Covenants or bonds to save harmless.—

A covenant to save harmless is an engagement by one to save another from all harm, trouble or cost, arising out of some collateral transaction

With regard to such covenants or bonds it is a general rule that they are not broken by a tortious act of another, as in covenants for quiet enjoyment, wherein the one who is guilty of the tortious act is the trespasser against whom an adequate remedy may be had

Cro Ej 275
1 Rol 434.
4 Co. 80
Cro E. 443.
1 Mod. 219.

But if the covenant is particular, that is, to save harmless against the acts of a particular person, the covenantor will be liable, even for the tortious acts of that person.—

Sta. 400.
Cro E. 212
Hob 35
1 Rol. 431.
2 Lev 39.

If a sheriff takes a bond to save himself harmless, against one's escape having the liberties of the ~~gaol~~ yard if the person escapes, he may due immediately on the grounds of liability, if need not wait till sued himself, for the creditor might delay bringing his action against the Sheriff till the one who covenanted to save him harmless becomes a bankrupt, by which means the Sheriff would loose his remedy on the bond.—

Cro El. 53.
123.

So if a surety takes a counter bond of indemnity and the Debtor fails to discharge the debt for which the surety is bound according to the terms of it, the counter bond is immediately forfeited, the condition broken,

3 Bul. 234.
Salk. 196.
5 Co 24a
3 Wils 274.
351
Comyns 525.

1 Term 599. If the surety may sue on the mere liability.—
2 do 100.
6 do 378 714: 5 do ~~310~~ 307: 7 do 67.—

If the principal has been compelled to pay the surety on the mere liabity of the latter, if has afterwards been compelled to pay the creditor; Chancery it seems will compel the surety to refund.
2 Term 104. 105.

Mr. Gould observes that he can discern no reason why a Court of Law might not give relief in this case by allowing the principal to bring an action of Indebitatus.—

It has been objected it is true that this would impeach a former Judgment. But this is plainly contrary
Burr. 1005. 7 Term 269. to facts. The Judgment on the bond of indemnity was strictly just & proper at the time, but something ex post facto gave it an inequitable operation.—

If one having obligated himself as surety
Salk. 196. 2 Bulst 234. takes a bond of indemnity after his liability has attached, no right of action accrues till special damnification — otherwise it would be absurd, for his liability commences immediately.—

If however he had executed a penal bond and
5 Co 24. taken a bond of indemnity ~~of indemnity~~ before the condition was broken, it would be otherwise.—

If a surety takes no bond of indemnity, but pays
Cowp. 525 527. the debt of the principal, he may maintain an action of Indeb. Assit. for money paid &c. tho' formerly
1 Term 104. 105. he could not, yet in this case mere liability does not

give an action.—

But if a Bond of indemnity is taken the remedy must be on the bond, for it is a maxim in Law that where there are concurrent remedies that one of the highest nature must be taken, & the remedy on the bond in this case is of the highest nature.—

2 Term. 100.

In cases of assignments of obligations the obligee may in some cases release after assignment, & in others not. The ground rule is; that if the obligation or instrument is not negotiable the release is good otherwise not. By the instrument being negotiable, is here meant, that the legal interest of the assignor may be so transferred as to vest in the assignee the right of bringing an action upon the instrument in his own name. The reason of this rule is that where the instrument is negotiable, the property of the assignor has passed by the assignment, & therefore the release has nothing on which to operate. But where the instrument is not negotiable the legal interest still resides in the assignor, of course he may release after assignment.—

the obligor cannot take a release from the obligee after the assignment, if he has notice thereof

1 Bos & Puller. 447.
Doug. 407.
7 Gr. 670.

So if the lessor after assignment of the reversion release to the lessee all covenants yet the assignee of the reversion may recover for all breaches of the assignment, for the covenant runs with the land & is assignable since the Stat. 32 Hen 8.

1 Ba 279.
2 Lev. 206.
Cro. 503.
2 Jones 102.
1 Ank 347.

and according to some it was so at Com. Law.—

But when a lease has been assigned by the lessee, he may oust the assignee of his action, for breaches committed after assignment, by a release given before action brot.; Yet a release after action brot. is not operative, for the right has attached to his person.—

Esp. 308. 5 Com. 235. Cro. 361. 2 Rol. 400.

The first branch of the rule is obviously opposed to the general principle laid down; for a lease is obviously negotiable, & of course a release by the lessee after assignment ought to be no bar to an action by the assignee; the rule is well established.—

A release before covenant broken of all demands, does not release the covenant, because there was no demand at the time of the release, there having been no breach.— So a release of all actions, suits & quarrels, does not discharge the covenant.— Salk. 171.

But a release of all covenants before a breach, is good i.e. it is a bar to any subsequent breach.

Esp. 307. B.N.P. 166. Co. Lit. 292. Allen 38. Cro. 99. 2 Show. 90. 5 Com. 235.

Where the Defendant at the instance of the Plaintiff became a joint security for a third person, and the Plaintiff was forced to pay all the money, he cannot call on the Deft. for contribution of a moiety. Qu. Aliter, if he had become a joint security of his own motion.—

2 Bos. & Pull. 268. 1 Esp. Rep. 479.

312

Pleadings of Covenants broken.

Esp 298. Stra. 814 Cro E. 317. or 8. 7. Cro E. 188. 209.

In an action of covenant broken the declaration should state that the covenant was by deed, tho' Case will lie on an instrument not sealed

Pow. 2445. Esp 266.

From the above rule "parol covenants" as used by Powell, seem to be an improper phrase

1 Ld Ld 263. 5 Co. 74. 5. 6 Co. 38. 4 Bar 109. Esp 298. 1 Wils. 16. Stra. 1180. 3 Lem 151.

Formerly the Plff. in action of covenant broken must always make a profert of the covenant tho' it were lost or in the Deft's possession. But he may now declare on a covenant, or other deed, that it was lost by time and accident.—

Salk 137. Esp 298. 2 Ray 478. Hett. 176.

In this action a breach of covenant must always be assigned, when the covenant is general, a general assignment of a breach is sufficient. This in an action on a covenant not to buy or sell certain certain titles, in two years, an averment that the Deft. had sold to A. & others not mentioning to whom, ~~is good~~ at divers times, is good.—

Cro J. 369. 9 Co. 60.

The most general assignment of a breach is in the words of the covenant, with a negative, as in an ~~assignation~~ alienation covenant, "that the lessor is seized in fee" and an averment, "that the lessor was not seized in fee" is sufficient.—

Cro Ld 348. Stiles. 5. Esp 299.

A breach should be so assigned ~~so~~ as to appear clearly to be within the covenant — therefore in an action on the covenant by the lessee "not to cut more

Covenants Broken.

timber than is merely for repairs:" an allegment that he cut timber to the value of ~~one~~ £100. is not good.—

If by subsequent words the Pltff. passes over the breach first assigned, as if he a ver "that the Deft. has not used the land in an husband like manner, but has committed waste." He will be allowed to prove nothing more, than that the Deft. committed waste.—

3 Co 8. Term 307.

When there is a proviso in a deed, defeating the covenant ~~thus covenant~~ in a certain event, the Pltff. need not set it out, but leave the Deft. to plead it. Thus: in an action ~~to~~ on a covenant to deliver pe. with a proviso that if the Deft. was prevented by the ~~sea~~ sea, the deed should be void. The proviso need not be set forth in the Declaratio

Esp. 302. Term 65.

But if there is an exception in the body of the covenant, the Pltff. must notice it, in assigning the breach otherwise it would not be known, that the breach did not fall within the exception

Esp. 300.

If the Pltff. sets out his covenant, & assigns an inconsistent breach, under a. Vig such a ~~such~~ a suit shall be rejected

Stra. 232 Esp. 300.

If the covenant is in the alternative to do one of two things, the breach must be assigned as to both. Thus: on a covenant by the lessee not to cut on wood without the assent or assignment of the

Stra. 229. Esp. 300. 2 Leon ~~245~~. 250.

lessor, an averment that "he cut wood without the assent of the lessor" is not good. —

But on a covenant to pay on cause to be
Stra 229. paid "an averment that the covenantee" has
Esp 300. not paid" is sufficient, for causing to ~~pa~~ be
paid is paying. —

If the covenantee is to pay
2 Roy 132. on one of two contingencies, "which shall
Esp. 301. first happen" an averment that one had happened is sufficient, without averring it to be the first. Thus on a covenant to pay on the "death or marriage of Sally Stiles" "whichever shall happen first" it is sufficient to aver that Sally Stiles is married —

If the covenant is that an act shall be done
Stra. 228. by one or his assigns, the breach must be in the
Esp. 302. disjunctive, that is, it must be averred, that the act has not been done by him or his assigns. This rule does not hold where the action is against the original covenantor himself, for there an assignment cannot be presumed, that is, it is confined to actions against the assignees. —

But on a covenant to do an act, as to convey
Salk 139. to a man & his assigns, an averment by the
Esp. 302. covenantee that it was not done ~~that it~~ to the
3 Keeb. 440. covenantee himself is sufficient — If it has been
5 Mod. 233 to his assigns, the Deft. must shew it. —

Covenants Broken.

In a covenant for a sum certain, there can be no apportionment of the demand, & the breach must follow the covenant, that is, a non performance of the whole covenants must be averred. — As if one covenants to pay $100 per ton for iron, an averment that the covenantee would not pay $50 per half ton would be ill on demurrer. —

But if the covenant had been to pay $100 per ton secundum ratum, such covenant would have been good: —

When the covenant is to perform some act precedent to the right of action, he must aver performance, as in a covenant to pay &c. "after proof and request made" So if the precedent act is to be done by a third person, performance must be averred, otherwise it is bad after verdict. —

But where there are mutual and independent covenants viz. where A. covenants unconditionally for one thing & B for another A. in an action need not aver performance — So in all cases where the engagement on one side is in consideration of an engagement on the other, either party has a right of action before performance

A plea that the Deft. has not broken his covenant is not good, for it throws the ques-

Hob. 217.
Esp. 304.
Salk. 171.
5 Co. 23.
7 do. 10.
2 Ld. Ray. 974.
Hob. 88.
9 or 7 Co. 11a
Co. Ent. 389.
1 Rev. 359.
Salk. 24.
5 Com. 46.
Sta. 615.
712.
1 Vent. 197.

tion of law to the jury. Besides it is bad on
2 Vent. 156 demurrer, as it amounts to no issue either gen-
4 Bac 88. eral or special, nor is a plea in bar, it suggests
no new matter.

It is laid down as a rule that
Co Lit 303. when covenants are affirmative, pleading per-
Esp. 305 formance is generally sufficient.
2 Com 83.
4 Bac 91.

This general rule must relate to cases in
5 Com. 283. 236. which the things covenanted to be done are
4 Bac 91. in some measure indispensable either in kind
or number; as a covenant by a Sheriff to return
all writs fa or to discharge the duties of his of-
fice.

In this case a plea that he returned all writs fa
4 Bac 91. is sufficient, but even here I suppose a plea that he
Show. P. C. 9. had performed his duty would not be good.

For otherwise the terms of the rule would contradict
Cro E. or C. 749. another well established rule which is where a Deft.
Salk 498. has covenanted affirmatively to do a number of spe-
4 Bac 88. 91. cific acts, he must plead performance special
Cro J. 358 360. ly, that is of each act.

The rule that where there are af-
Cro E. 749 916. firmative covenants, for the performance of an indefinite
number of acts, the Deft. may plead performance gen-
Esp 305. 1 Com 763. erally, is established merely to avoid prolixity & lum-
4 Bac 91. 5. dening the record.

5 Com. 83. 236. Where some of the covenants are

negative, the Deft. cannot plead performance
6 Co Lit 303 a
Cro E. 691. generally, but he must plead specially that he
4 Bac 91
Esp 315. has not done the acts covenanted against —
Advantage is to be taken of pleas of performance
by special demurrer only

2 Com 236. If the negative covenants are void, he may plead
Hob. 13.
Mod 856. as if they did not exist — Cro. E. 232. 3 Com 236. 283.
Cro E. 691.

Where the covenants are in the disjunctive,
Esp 305
Co Lit 303. the Deft. must shew he has performed, otherwise it
4 Bac 91.
8 Co. 133 is ill on general demurrer, tho according to some it is
Cro E. 232.
5 Com 82 84. ill on special demurrer only — 4 Bac 91. 1 Leon 311.

When the Covenants are to do some matters of
Dyer 229. law as to convey discharge &c. the Deft. must plead
5 Com 82
Hob 67. 107. performance specially, and sub modo that is, by
4 Bac 92. what means of conveyance &c that it may appear to
9 Co. 25. the Court —

So if the covenants are to do an act which
Cro J 560
4 Bac 92. must appear of record — as to levy a fine, for the
Co Lit 303 performance must appear by record which the Court
must try.

In covenants or bonds to save harmless the
Cath 395 Deft. may sometimes plead by way of performance,
1 Leon 71.
non damnificatus, or else he must plead that he
was saved (viz the Plt.) harmless & also quomodo
that is, shew the particular acts by which he has
saved harmless — The following are the rules of

distinction.

If the covenant or bond is to save harmless, from any thing ascertained in the instrument, as for payment of such a bond, non damnificatus is not good — he should plead that he had saved the Pltf. harmless, & shew by what acts. —

6 Co 374
3 Mod 244
Cro E 435
5 Com 236

So I presume if the covenant is to save harmless in general terms, that is, for things unascertained, as from all acts, damages and trouble that may arise from a Law suit, by any particular act, as by paying &c non damnificatus is not good. —

6 Co 395
1 Lev 71.

But if the covenant or bond is general to save harmless from all acts that subject to costs charged &c, especially if no specific mode is prescribed non damnificatus is good. —

Cro E. 916
6 Co 374
3 Mod 252
5 do 244
4 Bac 94.

Yet in this case if the Deft. pleads affirmatively, that he has saved the Pltf. harmless, he must plead quo modo

2 Co 3. 4.
Cro J. 363. 361.
Cro E. 916.
4 Bac 92, 3.

If the covenant is for an act to be done, even by a stranger, performance must be pleaded specially, that is according to the preceding distinction. There is an exception I suppose in cases of a multiplicity of acts &c.

2 Roll 159
Cro J. 559 560.
1 Hob 1
5 Com 82. or 32.
Esp. 205.

If the Deft. pleads non damnificatus, a replication consisting of a general traverse is ill. The Pltf. must shew the special damnification:

4 Bac 92, 94.
1 Lev. 89.

Thus if the Declaration is that the "Deft. has not
1 Saund 44. saved the Pltf. harmless" & the plea that the "Pltf.
has not been damnified" a special breach in
the replication is necessary.

A covenant in one
deed cannot be pleaded in bar to an action
2 Vent 217. covenant of debt on a covenant in an other deed,
Esp 305. unless it be in the nature of a defeasance.—

Still however a defeasance in a separate
Esp 306. deed, may be so pleaded. 3 Lev 293. & Salk 573. 5.
Cro 6 426.
Cro J 310
633

But the second deed must clearly appear
to have been intended as a defeasance, & to contain
proper words for a defeasance, as "reciting the first
deed & declaring it to be void &c.—

But one covenant may be pleaded in bar
to a covenant in the same deed without words of defea-
1 Lev 152 sance, for the sense is to be collected from the whole
deed, as where there is a covenant that the lessee shall
Esp 306 pay so much rent, & one by the lessor that the les-
sor may retain so much for repairs

If three covenant jointly & severally, all may
3 Burr 782.
3 Bac 698 be sued on one, but two cannot. The reason of this
Yelv 26.
Sid. 238. is that the covenant must be treated as altogether
joint or several.—

This last rule is common to all cove-
3 Bac 697
2 Vent 99. nants. If the covenant is joint only, all the cove-
Salk 393. nantees must be sued —

2 Lam 282. If there are two or more joint covenantees ob-
Stra 1146. ligees, all must join in an action, otherwise
5 Co. 18. the Deft. would be charged doubly.—

This rule is also common to all contracts. if all do not join, the Deft. on oyer may demur—

In some cases where one covenants with two or more obligee, jointly & severally, that is to them and either of them, or each of them, one of the obligees may sue alone, in others all must join

The rule is this " if the interest of the obligees
5 Co 67.5 appears to be several," each may sue separately
18: 19. as where there is a devise to A. of Black acre, & of White acre to B, & the lessee covenant with both & each as to all.—

But if Black acre only is devised
1 Bac 696. to & the lessee covenants with each for the interest
5 Co. 18: 19. of the lessees is joint & both must ~~sue~~ join, in each
Jonk 262. action on the covenant.—

So the co-obligors or covenantors may bind themselves severally for the same cause;
5 Co. 19a yet co-obligors cannot have several ~~actions~~ interests or rights of action for the same cause—

So against two jointly & severally of the same thing, is joint only. 5 Co. 19a.

If two covenant jointly & severally each may be
Stra. 553 sued alone, for the neglect of the other, tho' the
4 Bac 186 one sued has not been negligent; recovery
Cro. 154.

against one is no bar as to the other; so taking the body of one in execution is no bar as to the other, but actual satisfaction is a bar.

2 Bac 699. 8 Co 136. Salk 300. Co Lit. 264 — If several are bound jointly & severally & one is made Exr by the obligee, the obligation is released at Law.—

Cro E 373. 9 Mod 69. 10 do 515. Salk 240. 2 Bac 311. — So in Chan. as to obligees representatives; but not as to the creditors or legatees. 2 Pow. 244, 5.

Sha 1146 2 Term 37. Bum 323. — If an instrument recites that A. B & C on one part covenanted to execute a certain agreement, & A. does not execute, the covenantee may sue B & C. alone & aver that A. did not execute.—

3 Bac 697. 1 Ch. 236 Bum 2611. — If two or more bind themselves in an obligation together, or make a promise together, the contract is joint. of course I suppose the word, "jointly" is not used unless words implying a several obligation or duty are used.—

Notice and Request.

At Com. law a request by the Pltff. is clearly necessary, but in many cases it may be by suit only —

The Pltff. must always aver notice to the Deft. when action lies not without notice; as where the fact on which the demand arises, is as between the parties, confined to the Pltff knowledge — as in case of a promise to pay the Pltff or at such a rate, as any other person shall pay the Pltff. for the same. —

Rob. 51.

But if the promise is to pay as much as Deft should pay, notice is not necessary —

5 Com. 53. Cro. J. 432. Raud 42. 1 Roll 463. 625

So on a promise to deliver so much corn if the Pltff. approve it; the Pltff. must aver that he gave notice to the Deft. that he did approve it.

5 Com. 53. Cro. 8. 249. 250.

So on a contract to an aunt by her creditors, when the obligee shall assign; the Pltff. must aver notice of it to the Deft.

1 Robb. 462.

So it must appear that notice was given in due time, as on a promise to pay before the end of such a fair, as much as the Pltff. disburses; the Pltff. should aver notice given in before the end of the fair, otherwise it is too late. —

1 Roll. 169.

But if the Deft contracts for performance of an act by a stranger, the Pltff. need not aver

1 Roll. 462. 463

Notice & Request

2 Bulst. 144 Hob. 14. 2 Hob. 315. 316. notice; but in this case the Deft. must take notice at his peril, as where there is a promise to pay pe when J. S. marries—

So in some cases it seems, that the Deft. is bound to give notice— as when he promises to deliver so much rum when he shall receive it.

In some cases the Pltf. must make & aver a special request; as if the Deft. engages to do a collateral act. no day being fixed; or on request.

5 Com 52. Autw 231.

It is laid down that no actual request is necessary, when the debt or duty is precedent to the contract, or promise, on which the demand arises, tho the contract be to do on request, for here the request is not the cause of action.

3 Salk 308 Cro. E. 74.

But this rule must be understood of those cases in which the subsequent contract does not vary the duty already existing; for the subsequent contract may be to do a collateral thing on request pe

But where the right of action is founded on the promise & request, there being no antecedent duty, a special request must be averred as where there is a promise to pay on request such sums as the entertainment of the Pltf. should come to—

5 Com 52. Cro. J. 183.

When a partial request is necessary the time & place must be averred.—

5 Com 52. Cro. J. 183. Cro. E. 85. Autw. 231.

The want of an averment of a special request when necessary is not cured by verdict.

Cro. E. 74, 5.

So upon a promise

5 Com 52. 3 Bulls. 299. Croft. 183. to pay on condition that J. S. does not pay on request, a special request to J. S. must be averred. —

On a promise to pay the debt of a stranger upon request, a special request must be alledged, for there 3 Salk 308. was no antecedent duty, if the request is part of the agreement. —

When a special ~~assurance~~ request is necessary, the averment is traversable: when unnecessary the averment is not traversable. — 1 Lev. 389. 3 Salk 308. Croft 74.

It is a general rule that where there is a contract to do a certain thing, "on demand" the Deft. cannot discharge himself by tender without request, a special request is necessary: thus on due bills given by merchants to deliver such a sum in goods to the holder, request must be made not only because the merchant cannot discharge himself without request, but because the common course of business has established the the necessity of a demand. —

So I suppose if a merchant engages to deliver such a ~~sum~~ in goods at a time fixed, for he cannot select the goods — for the same reason as operated in the example, first put on the score of general convenience, requests must be made for payment from public offices in their official capacity. — On the other hand where the Deft. can discharge himself

Notice & Request.

by tender, a special demand is not generally necessary, tho the agreement be to pay "on demand."

The two last rules so far as they interfere with the particular ones, ~~as~~ laid down, are subordinate.

Questions which have arisen under the Constitution of the United States.

The 10th section of the 1st Article of the constitution of the U. States declares 1st That no States shall make any thing but gold & silver coin a tender in payment of debts. 2d. Nor pass any ex post facto Law, no Law impairing the obligation of contracts.—

The supreme Court of the U. S. have determined that an ex post facto Law means a Law which extends to criminal cases only, & differs from a ~~retrospective~~ retrospective ~~chas~~ a retroactive law which extends as well to contracts as to crimes—

A retrospective law which regards civil cases only, is not then forbidden by the constitution, tho' it is by the Com. Law.

So that no Law shall be made "impairing the obligation of contracts" is a Com. Law doctrine. The two last recited clauses then are merely declaratory of the Com Law.

Every thing respecting retrospective laws affecting "civil contracts" is meant to be provided against by the clause forbidding any laws being made "impairing the obligation of contracts" therefore by the constitution all Laws having a retrospective operation, whether civil or criminal are prohibited.

Constitution.

It has been a question whether special acts of insolvency, have this forbidden retrospective operation. The first insolvent acts which were ever made undoubtedly had this retrospective operation. Had there never till now been any special insolvent acts made they would have come within the constitution. But at present men when they enter into contracts are fully apprised of their liability to be defeated by insolvent acts passed by the Legislature. The great question has been whether the constitution intended to make any alteration in this state of things

The question was first brought up before a branch of the national court, in the State of Conn.t in this manner. One Huntington petitioned the Legislature for a special act of insolvency. while the petition was pending, he prayed for a writ of protection that he might come & attend the assembly free from arrest; the writ was granted & while he was attending the assembly under their protection, his Creditors directed the Sheriff to attach his body & commit him to prison on the ground that the assembly had no right to grant his petition & of course the writ of protection would be void; the Sheriff accordingly committed him. —

Huntington then prayed out a writ of Habeas Corpus from the assembly, which was granted commanding the Sheriff (Chester) to release him, which done the creditors brot. an action against the Sheriff before the national Court. It was then determined by Judge Law & Chase, (with the additional opinion of Cushing) that a state had a right to pass special acts of insolvency without infringing the constitution. This was about the year 1795. This opinion has been affirmed by the Supreme Court in Bano ~~of Pennsylvania~~. If even the first insolvent act was an infringement of the ~~constitution~~ the common Law, the maxim communis error facit jus would at this day prevent such consequence, as is the construction at present given to mortgages.

Private Wrongs.

Private wrongs are an infringement or deprivation of the private or civil rights belonging to individuals, considered as individuals.

The subjects of Torts are either the persons or property of those who suffer.

The tort may have also been committed on both. If the tort be done to the property of the injured person, his real or personal property may be the subject, or both.

In every case of a tort the injured person has a remedy, unless it be accompanied with a felony. If so it is doubtful whether there can be a remedy, the injury being merged, as in the Eng. law.

In some cases of tort there arises two actions: one in favor of the party injured, & one in favor of the public — & as the rights of the public are altogether paramount to private rights, the wrong done to the individual is merged tost or swallowed up in the public offence, if that offence amounts to a felony.

It is a true position that the right of the public is always paramount to the private right: & as in cases of felony, the public by the old Com. Law always had a right to the person or ~~right~~ life of the wrong doer, and also to

all his property, it followed that nothing was left for the sufferer.

But as there are now in the U. States but few cases of felony where the life of the wrong doer is taken, & fewer still where all his property is taken, it is submitted whether the sufferer ought not in every case to have relief, when either the person or the whole of the property is not taken, the Eng. books & the doctrine of merger notwithstanding?

As the doctrine of merger resulted from the peculiar requirements of the Law, i.e. of the person of the wrong doer that it might be held out for an example, & of all the property that the public might be remunerated for the breach of the Laws as far as might be; & as the law in America does not require these things but is changed, the rules of law which resulted from this peculiar state of things, ought as Mr Reeve supposes to be changed also. for where as in this case the reason of the rule has ceased, it is the height of weakness & folly not to change the law also.

And even in Eng. if from the melioration of the punishments, either the life or some of the property of the offender be spared, Mr Reeve thinks they ought upon the genuine principles of the Com. Law to be made subject to the demands of the injured person.

No suit however, it is true could be brought against the representatives of a person who was hanged for the commission of the offence: but this rule depends not upon the principles of merger, but upon the idea that no man's Executors shall be sued for the wrongs of the testator or decease.

In pursuing the subject of torts we must of course advert to the several actions arising ex delicto, of which some arise from simple tort, disconnected from the idea of any force or violence. Some arise from the idea of torts connected with the idea of actual force & violence used.—

From the first division arise the several kinds of actions of Trespass on the Case. This is an action arising ex delicto. Simply from tort or wrong where no breach of any contract is suggested, & no forcible violence imputed to the Deft.

This negative description is the only one which can be easily given to this action; for it would be impossible to recount all the various & lounging these anomalous suits. They may be brot. for injuries affecting the Pltfs person, or his reputation, safety, health, & other nuisances. Or they may be brot. for injuries affecting his property, or of some incorporeal right, or some

reversionary or expectant interest. It may be lost also for deceits or frauds as in Salesp improper negligence from which damages may result, trover or conversion &c &c.

Trespass vi et armis & replevin which lie for torts accompanied with force, real or implied as for Assault, Battery, false imprisonment Property wrongfully taken &c &c.

General view of Slander.

Slander consists in maliciously defaming a person.

Malice & Falsity are the essential ingredients of if such injuries to the reputation of one, as the injured person may recover damages for. & if neither of these exist the Pltf. must fail in his action.

To speak a truth of one therefore altho it be said with malice & with a desire to injure, will not entitle to a recovery.

So also to utter an untruth without malice will not support an action. This will necessarily lead to some enquiry into the legal effect of the word malice. This term does

not convey exactly the same idea as in law as in common parlance. The extent of the term is better understood by the latin word Malitia - as used in the Books, it means any improper motive, or wanton disregard to one's fellowmortals, which may actuate a man in a particular transaction, & is not confined to any special ill will or spirit of revenge against an individual. -

When a man coolly relates any slanderous report of another not having any substantial reason for it, the law will presume him to have been actuated by malice, & this altho he really believed the story which he propagated. - For it was at least idle & unnecessary for him to repeat the story, & having told it & if cause wounded the reputation of one, he should make retribution, unless he can prove the story to be true -

However if there be an evil report about a man which is accompanied with such circumstances as to cause it to be generally repeated, & one man tell it to another, he will merely be presumed to have been actuated by malice, & this presumption he may by the attending circumstances rebut. -

Recovery in

slander may be had in two classes of cases Viz. where the words spoken are actionable in themselves & where the words spoken are not actionable in themselves, but being attended with special damages to the person about whom they were spoken, are sufficient to support the action if the special damages be proved, & in the latter case the special damages must be stated in the declaration.—

Words actionable in themselves are divided into 4 classes Viz.—

I. Where by them one charges another with the commission of a fact punishable by the law more severely than by mere fine, then are the words actionable in themselves: & tho' the Plff. cannot prove any special damage whatever, & state none, yet he shall recover; for it will be presumed that he either would or has or may suffer damage.— For altho' the facts charged, if true, may subject the party accused to punishment, but to none of a higher degree than fine; yet the words as a general rule are not actionable of themselves.

But there is a middle class, wherein the words are or are not actionable according to circumstances.— As it respects this class of cases the books of decisions

are quite confused. But from a collection of the several decisions Mr Reeve thinks that the following rule may result viz. if the charge be a crime, which according to the general ideas of people affects the reputation of the person charged, it being a charge also, which if true, would subject him to a fine, then the words shall be considered actionable in in themselves. If the charge do not if true, subject the party to punishment by fine, the words are not actionable of themselves.— Or tho. the words subject to a fine, yet if it be not such a charge as according to the prevailing notions of mankind, had a tendency to injure the reputation of the man, the words are not actionable of themselves.— There is a law of the City of New Haven, that if any one throw out ballast from his vessel into the harbor, he shall be fined &c. If a sea Capt. be accused of it, if it were true, tho. the charge would subject him to a fine, it would not however according to the common notions of people injure his reputation materially; such words therefore are not actionable.— This class of cases may however be included under the first division.—

Salk 696. 4 Bac 487

II. The second general class may however be constituted of cases of words actionable in themselves

4 Sem 366. 4 Bar 490. 1 Com. 182. selves are such as are calculated to injure a man in his trade or profession —

But the words must be such as would go immediately to affect him in his trade, for every stain upon a mans moral character is calculated in a degree to affect him in his trade tho' perhaps remotely or in a circuitous manner.

Thus to say of a merchant that he is a bankrupt, has a tendency directly to affect him in his trade. To charge a physician with want of skill in his profession is actionable for a similar reason. To say of a Lawyer or any other agent or Attorney any thing which shall injure him in his profession, is actionable. To say of a clergyman that he was a heretic, is according to the old books actionable. In Conn. to call a Clergyman liar has been held actionable —

III. Those words are actionable in themselves, which charge a man in office with principles inconsistent with it, or with inability to perform its duties — Whether the office be one of dignity trust or profit — Under this class that species of scandal called <u>scandalum magnatum</u> is by the Eng books included. — Of this we know nothing in Connecticut —

To say of a man holding an office that he is not fit for it, in a ~~colloquium~~ respecting

his office, or him as an officer is actionable. So say of a Justice of the peace in a colloquium respecting his office, that he is "a Jack ass of a Justice", or "a beetle headed Justice" for is actionable. But in such cases it must be averred in the declaration that the words were spoken respecting his official acts or ability, & must be so proved or the Pltf. will fail.—

Under this class, a distinction has been taken between offices merely honorary, & those which are lucrative. This distinction Mr Reeve supposes not to be founded in principle

IV. The last class of words upon which a recovery may be had, without having damages, are those which may operate to exclude a man from society — as to say of J. S that he has the leprosy, or the venereal disease — And an action was brot. in Count. against a man for saying of the Pltf. that he itch, but the suit did not receive a legal determination.—

In these cases of words actionable in themselves, the Pltf. need not to entitle himself to a recovery, state any special damages. But if special damages have accrued, it is well to state them, as a aid to increase damages — for unless they be stated in the declaration, the Pltf. cannot go into the proof of them.—

Private Wrongs.

Words actionable in themselves, may be, & frequently are coupled with other words, which shew that the Deft. did not speak them in their legal sense. To say of a man that he is a thief is actionable; but in order to show in what sense they were spoken, or meant to be taken, the whole of the conversation must be taken together, from which it appears that the Deft. did not understand his expression in the legal sense, for his words were J S is a thief, because he stole my trees; now as petty is not predicable of trees, the words appear not actionable — So when Sally Stiles sued Tom Yokes in slander for calling her a thief, it appeared on trial that he called Sally a thief, because she had stolen his heart; poor fellow! the Pltf. failed in her action

But the fact need not be stated in express terms, provided the idea be unquestionable conveyed, it will suffice — As, if the Deft. say "the birds told me that J. S. stole it" — or as if in a significant manner the Deft. asked the witness if he had heard that J. S. stole it — or if the Deft. set the witness to guess who stole it, & J S's name being mentioned, he tells the witness significantly so that he need not guess again. For to convey the idea by words would seem sufficient —

But it would seem that words were absolute

ly necessary to constitute the offence of parol slander; since when a man found out a method of convincing all his neighbors that J. S. stole his the Pltfs wood, & a suit in slander was brot. the Pltf. failed - This was a correct decision, & Mr Greene thinks an erroneous one. And on this principle it would seem that a dame man could not be guilty of parol slander. -

The words spoken must impart some degree of guilt, - therefore to say of a man that he would steal, or is inclined to steal he is not actionable. for these are not charges of the commission of any fact, but merely an insinuation which is not in law actionable - however words spoken adjunctively, may be actionable; as if the Deft. say "I left my saddle here at dusk last night, J. S. passed by soon after, & this morning my saddle was gone - & you know J. S. is a thievish Dog" these words taken in their connection are actionable - as they were holden to be actionable.

Words not actionable in themselves, by a-nement & proof of special damages will support an action.

For if such words as not except by distant implication, affect the moral char-

-acter of the man, & he can prove special damage he shall recover. To call a merchant a Bankrupt is actionable; but to call an individual not a merchant a bankrupt is Bad which surely but distantly affects the moral character of the man, will be a ground of recovery, provided special damages be proved; but in all such cases the special damages must be averred in the declaration for it is the gist of the action.—

A review of the preceding remarks with the authorities cited.

The authorities on the subject of slander are more numerous than any other title in the Law.

At one period of time the governing principles have been wholly repugnant to those which governed at another. At one period it had become a maxim, that all words should be taken in a bad sense: this was a very easy rule of construction, whereby words were tortured to convey some wrongness meaning, that the party might be subjected. At another period the rule of construction was that the words should be taken in mitiori sensu. The consequences resulting from this were most pernicious.—

Esp. 511.
10 Mod. 198.
4 Bac. 487.
505.

But the modern rule

rule is that the words, connected with the circumstances, shall be taken in such a sense, as that in which they would be most usually understood by people in general, of those who hear them. And the intention of the speaker is a genuine rule, of the question whether the speaker intended to fix the charge upon the Plff. is the most material one.—

Cro J. 114. 205.

This last rule without doubt is by far the most rational one, & is perfectly well calculated to do complete justice.—

The law having been so often varied it is easy to conceive, that the authorities must be as they are, irreconcilable.—

Restricted as in the foregoing remarks it may now be laid down as a rule that words charging the Plff. with such a crime as is punishable, is actionable.—

However the rule laid down in the books is, that such merely are actionable, as if true would subject the Plff. to corporal punishment.— It is observable that words may be actionable tho. they do no injury to one's reputation; & they may also injure one's reputation materially & yet not be actionable.

Cro J. 496. 3 Bl. 460. 2 Q. Cro E. 638. 602. 4 Bar. 483.

The rule as restricted would stand thus; words which if true, would subject a

man to corporal punishment, of words which if true would subject a man to fine, being such words as according to the common modes of thinking, would derogate from, or impeach his morality - are actionable.

As it respects this first class of words, namely, such as would support an action without proof of special damages, it may be remarked again that the charge which the Deft. meant to fix upon the Plff. must be of a thing which is a certain & definite crime. Thus to call a man a rascal, is not actionable without a per quod the Plff. received damage pr - because the charge is not of any definite crime. B Opposite page

But where is the difference between calling a man a Bankrupt, & calling him any other thing which imports no turpitude in the person slandered? Relative to this part of the subject there has been much contention. Mr Reeve apprehends the rule to be that where a man unnecessarily, wantonly & maliciously says of the of thereby which, to imply either to a destitution in some degree of integrity, honesty, or of morality, or an inability in any degree to pay his debts, or to fulfil his contracts pr whereby the person slandered

suffers any particular damages, (if the words be not actionable in themselves) then if true the words will maintain an action — as in the case here put of a Bankrupt — for granting that there was no implication of want of integrity in the term — yet as the expression implied an inability to pay his debts, it comes within the rule.]

Hence to say of one that he is a liar, is not of itself actionable; or that he is a corrupt man — On the ground that the Law did not recognize adultery or fornication as crimes, to charge one therefor with the commission of either, was not actionable — altho' the Spiritual Courts punish the parties — for by punishment is meant temporal punishment — But there is a custom of the City of London that common prostitutes shall be carted round the City — In London therefore to call a woman a prostitute is of itself actionable —

1 Roll 34.
Moor 29.
2 Mod 169

So also it is in Court — for it is a rule of the common law, that any class of words which were of themselves actionable, on the ground of the commission of the facts being punishable, are no longer actionable when the fact is no longer considered as a crime, by the Law — This rule e converso is true, therefore since adultery in Connecticut is

punishable, it follows that ~~is~~ ~~malitious~~ of false charge of it is ~~true~~ actionable.—

It has been remarked that when one ~~has~~ amuses another of a slanderous thing, the whole conversation of the temper of his mind at the time must be resorted to — for there may be estimate ~~in~~ the particular observation sued upon, as that it will no longer import to be the name of such a charge as is punishable.—

Cro J 114. 2 Ro 205.

2d. Such words as have a tendency in a direct manner to affect a man in his trade are actionable in themselves — Thus to say of a Lawyer "he is a knave" is actionable, for it will prevent clients from trusting him with their pecuniary concerns, which will be to take from the Lawyer his means of livelihood — "he'll milk your purse for you" meaning to convey the idea that he charged extravagant ~~wages~~ fees — of such an imputation connected likewise with an allusion to a want of honesty, perhaps goes directly to take away his business. — also to say of a Lawyer that he is "a quack lawyer" which plainly implies that he did not understand his business very well, has been holden to be actionable, altho a previous decision had determined it not to be actionable — So say of a physician "that he is a quack" — has been holden actionable — So say of a clergyman that

Cro J 278. 2 Vent 28.

1 Roll. 52.

1 Roll 61.

he preaches heretical doctrines, has been holden actionable in Massachusetts — But a difficulty arose (for the Deft justified by alledging it to be true) how to ascertain what heresy was — In this case Mr Reeve recommended to the Court that a convocation of clergyman be called of the same sect in religion with the parish in which the Plff ~~lived~~ was settled, & of the same to which the Plff pretended to belong, and be requested to form & determine whether the doctrines preached by the Plff were consistent with the principles professed by the sect, & of course whether they were heretical — This method was pursued & the doctrine found to be orthodox — This being determined the case was determined in favor of the Plff. —

3ly This class of cases has been sufficiently treated of perhaps. — It may be added that a ~~warrant of~~ the charge of corruption or want of integrity is not according to the general rule actionable, but when spoken of a man in office in a colloquium respecting his office, or him as an officer, they are so — But the words must direct ly apply to him as an officer, or that "he is a prejudiced or corrupt judge" — or it must appear from the conversation that the words were applied to him in his official capacity. — Thus in

1 Roll. 58.
1 Lid 342.
1 Roll. 56.

speaking of J.S. who was a Judge — A said he was a "blood suker" — but as this did not appear to refer to him as a Judge (which might infer if it did, that he was a corrupt tyrannical & unjust Judge) it was not holden actionable — for it applied to him only as a penurious man. —

1 Rol 56.

A distinction has been taken in a case in Salkeld that when the words are used to a person in an office of profit, & when in one of credit only — Ex.gr. — In offices of profit words which impute either want of understanding of ability or integrity are actionable — But in those of credit, words which import want of ability only are not actionable — as to say of a Justice of the Peace "he is an ass" or "is a beetleheaded Justice" is not actionable, & the reason given was that a man cannot help his want of ability, as he may his want of honesty, & that these words import no corruption or dishonesty — But Mr Reeve does not think that this distinction would at present obtain — The case in Salkeld ought to have been decided as it was, but not because of the preceeding distinction — The words used did not seem by the case to have been applied to the Pltff. in his official situation — it is true the word "Justice"

Salk 695.

was used, or mentioned, as descriptio personae — So say of a Justice, "I never got any Justice from him, but nothing but injustice" was holden actionable, & yet according to the above distinction, it probably would not be so considered —

4ly This last class of words actionable in themselves, are such as tend to exclude a man from society — as charging one with having an infectious disease — as the leprosy, pox &c —

4 Ba 488.
Hob. 218.
4 Co. 172.
1 Com 184.
Esp 498
4 Co 17.a

But as to this class the construction is somewhat strict, for the words must be in the present tense, & import that the Deft. had the disorder at the time of speaking the words — However if the Deft. had used the past tense merely as a cloak to avoid the law — Mr Buller supposes it would not avail him —

2 Term 473

It is agreed on all hands that passion will not justify a slanderous assertion —

1 Lev. 49.
4 Ba 522.
Esp 520.

A proposition is to be found in the books that heat of passion may be given in evidence & will go in mitigation of damages — Such matter may or may not go in mitigation — if the Deft. himself begin the dispute, or is in the wrong & without such provocation wrought himself up into a passion (Sam Baldwin) then, it will

rather aggravate the damages, than go in mitigation of them — But if on the other hand the Pltff. highly abused the Deft., & provoked him to say some intemperate things, then it will go in mitigation —

The idea has been held up, & generally dwelt upon in argument, that there can be no great criminality in repeating a story which the Deft had heard from others, but this is an erroneous idea altogether; because if a man will wantonly sport with another's character, to such a degree as to report a vile slanderous story about him, he will show that lawless misanthropic spirit which is the gist of this action viz: Malice —

It has been strangely contended that when A. tells B. that C. told him (i.e. A.) that D. was a thief, A might, by proving this, protect himself, because it would be proving the truth of his assertion — But this it was decided should be no justification; but might under particular circumstances go in mitigation of damages. —

1 Ev. 277.
Holl. 64.

And indeed the circumstances might have been such as to operate as a full excuse, & rebut the presumption of malice altogether — as if the assertion be accompan-

ied with appearances which are pretty convincing proof, that the story was true, in such case there can be no Harm in repeating it.—

So if the words were spoken out of a motive of friendship, & without an intention to defame — privately perhaps, & in confidence, the action is not supportable — As where a servant brot. an action against her former mistress for saying to a person who came to enquire her character "that she was saucy & impertinent, & often lay out of her own bed, but that she was a clean Girl & dis her work well" tho' the Pltff. proved that she was by this means prevented from getting a place — Yet L. Mansfield said that malice was the gist of the action for slander — it does not appear here, — this was a confidential declaration, & ought not to have been told or ~~discovered~~ disclosed —

B.N.P. 8 Lesp. —

If the word were used in the course of legal proceedings, the general rule is no action will lie, — But in such case the words may not be used but as tending to prove some point important in the case — for if this be not the case, & they be said in that place merely as a shelter from the Law — then the speaker shall be liable for slander — The intention then maliciously & falsely to lay such a charge to the Pltff. would

1 Rol. 33. 2 Burr 807. Cro J. 90. 1 Rol. 56. Palm. 68.

be the leading point.—

To charge one with an intention or aptitude to commit any given crime is not sufficient to support an action

A charge must not only be a particular definite crime committed, but it must also be definitely charged, against a particular one. Thus: if three persons be present, & J.S. says "one of you stole my horse" neither of the three according to the rule could sue the slanderer, & there can be no joinder in such a case, & if the crime were a punishable one, against whom could the prosecution be commenced.— Yet Mr Reeve apprehends that if by averment it could be made out for whom the charge was meant — such person ought to maintain his suit — as if the Deft. had hinted such things of the Pltff. before, or as if there had been a personal quarrel between them.—

For where J.S. told Tom Nokes that his "son or his wife or his brother (and he might guess who) had been guilty of forgery, either of the three may by averment shew that he was intended.—

Cro. J. 107.

If two persons say the same words of another yet a joint action will not lie.— Where the expression is "they Bogges (the name of a family) are traitors" this it is not actionable.—

Bac. Ab. 5.

1 Roll. 80.

If the intention to charge a particular crime upon
Cro. E. 289. one be apparent, it will suffice — as if it be done
12 Co. 134 by way of question — Have you heard that J.S.
stole A's horse &c —

So if the idea be conveyed by way of conjecture — as if significantly to say "I guess J.S stole &c —

So where J.S says I know what I am, & I know what Tom Stokes is, & I know that I never stole sheep — this expression was holden actionable, because the idea was clearly conveyed that Tom Stokes stole. —

So where words are used adjectively, they may be actionable

Of the Pleadings in Slander.

Great strictness formerly prevailed in regard to the pleadings in this action — particularly in regard to the declaration — The declaration would fail, for
Hard. 305. instance, if the precise words alledged in it, were not exactly supported by the evidence —

But of later years, if the substance be stated, and what is stated be substantially proved by the evidence, tho' not in the very words, the declaration is good.

It is usual in the first place, for the Pltff to state his character to have been immaculate in

every respect, that he was always of good fame & name & particularly mentioning his freedom even from the abominable vice of stealing (for whatever the offence may be) Then stating that the Deft. envying his good character & these allegations are not perhaps necessary, for they are not proved - however they are usually made - but it is essential next to state the words spoken - the place & time are next to be stated, & that they were said in the presence & hearing of A. B &c -

When the word "maliciously" is left out, the declaration has been holden good after verdict - but the ground was that the word "falsely" implied the malice - If such a meaning could be given - it would seem that the declaration would have been good on demurrer. However it is absolutely necessary that either this construction should be given, or that both of these words should be inserted in the declaration, for they are the gist of the action -

So also it is necessary that ~~the~~ either the words "in the hearing of A. B &c" or "in the presence of A. &c" should be inserted, but it is common to insert both, & it is to be remarked that the decisions that either might be left out, were all had after verdict - the terms openly & publicly should be inserted -

It is necessary also to aver that the words were

spoken of the Pltf. — But sometimes the declaration may be good without a direct averment, but by innuendo — as if A. said of B "you did steal my ps" B. in repeating this in his declaration, may immediately introduce this innuendo viz. "meaning the Pltf." ps — It is usual next to state the loss of friends ps ps but this cannot be essentially necessary, as it is not such a fact as may be proved. —

Yelv. 159. 1 Lev. 250. 2 80. Cro E. 486. Cro J. 39. Cro E. 189.

If the slander were spoken of a man in office, he must state in his declaration that he was in a certain office which he held & that the words were spoken in a colloquium concerning his office, or of his official standing.

In case the words should be spoken to apply by way of description as if J. N. say to J. S. "your son is a thief ps" then the Pltf. must allege that he was the son of J. S. which the Deft. meant ps —

Cro E. 443. Cro E. 416. Mod. 84.

But where the description is by way of addition, as the addition of Esqr. or Capt. ps the Pltf. need not allege that he is Esqr ps —

If the words spoken have relation to the existence of another fact — as if the expression were "A. is as great a thief as any in Eng." the rule requires an allegation that there are thieves in Eng. In this case the principle seems to be extended

quite unnecessarily so — There may exist cases however where the principle may properly apply — as where the words were "there has not been a robbery in the town of L. for three weeks, but that G. S. (the Plff.) has had a hand in" — For in this case the Plff. may perhaps be compelled to prove there was one or more, but he is never compellable to adduce proof that there are thieves in Eng. —

Again: if the words spoken are A. poisoned B. the Plff. must aver & prove that B. is dead; for the expression has relation to the fact of B's death: & if the expression were that A killed B. perhaps the rule might by some be supposed to relate to the fact of B's death; & that of course the Plff. must aver the death of B — but Mr Reeve thinks that such an argument is wholly unnecessary; for whether B be dead or not he apprehends to be immaterial; the liability of the Deft. depends more upon the intention & sense of the conversation. This rule took it rise when the words were taken favorably for the Deft. in meliori sensu. —

When words not actionable in themselves, are said in conjunction with those that are actionable in themselves; as if A. call B. "a rascal a liar & a thief" it is to be observed that when all are connected, and stated in one count, the declaration

will be good after verdict found — for the Court will presume that the Jury founded their verdict on such as were actionable —

But when words not actionable in themselves (there being no special damage alleged to have been suffered in consequence of such words) are included in one count, & the words actionable in themselves in another, the judgment will be arrested after verdict; for how can the Court determine whether the Jury founded their verdict on the words rascal & liar or on the word thief — Mr Reeve does not see the propriety of this distinction — It is hardly supposable but that the Jury will be sufficiently informed by the Counsel or the Court in the course of the trial which of the words are actionable in themselves, & which not — Let the Deft. demur to that count in the declaration, which includes the words not actionable, & plead the general issue or any thing else as to the residue — And if this be not done why not in this case as in the former case presume that the Jury founded their verdict upon that Count which includes the actionable words? —

2 Bur 7.
10 Co. 130.
3 Wils. 177.
1 Lev 508.
532.
Cro E. 328.
788
Stra. 1094
4 Co. 17.
1 Rol. 39.
51: 43.
65: 71.
1 Vent. 117.
1 Lev. 156.
Cro J. 622.
Stra 142
Cro E. 268.

It is a rule that words tho' actionable in themselves, may be proved on the trial, which are not mentioned in the declaration — But for

what purpose? — If the words be actionable in themselves they cannot be introduced to increase the damages, since they may be the foundation of a separate action — But such words are introduced merely for the purpose of proving the most essential allegation in the declaration to wit, Malice — For as the Deft. is suffered by extraneous matter to rebut the presumption that the words spoken, were maliciously spoken, so may the Plff. to prove this allegation, but for this purpose only, that is, malice, introduce other words not actionable in themselves —

If actionable words are stated, words not
Esp. 7. actionable may be given in evidence — The reason assigned for this indulgence is, that the admission of such testimony is to aggravate damages — But this reason is founded on principles
+Esp. 518. evidently false — +The only rational ground for introducing evidence of this kind, is, that the Plff. may thus prove malice in the Deft.

When the Deft. means to rely on the truth of the words spoken, the Eng. rule is always to plead it specially, as by way of justification — In Ecclesiastical it may be given in evidence under the general issue —

Slander, i.e. paid slander, is not by the Eng. law a crime; i.e. it is not punishable

criminally, or by a quasi-tort action — In Lou. it has been holden a crime. —

Of Libels.

4 Term 126. 1 Black 193. 3 Bac 490. 4 Bac. Bur 980. Sta 788 898. 2 Wils 403.

A Libel is any malicious defamation of a person living or dead, made public by writing & tending to excite resentment, or to expose the object of it to odium, contempt or ridicule.

This definition seems formed chiefly with reference to libels considered as public offences.

4 Term 126. Cowp 620. 5 Rep. 125. Esp 506.

Writing & sending a letter to a person is a sufficient publication, for a public prosecution, not for a private action.

1 Mod 58. Hob 62.

Not if it be a friendly admonitory letter to a party

Singing or repeating words written may be a sufficient publication of a libel.

Reading a libel to other persons may be a publication.

Esp 504.

It is a general rule that whatever words would be actionable if spoken, are clearly so when written.

1 Term 748. 2 H Bl 532.

Therefore to publish of a person that he is a swindler is actionable, so it is the same if spoken only.

1 Term 752 2 Show 313. 1 Mod 58.

Words written however are often actionable, when if spoken they would not be so.

By writing therefore to call a man a rascal, vil-

Libels.

lain & liar &c are actionable words, without
2 Wils. 403. alledging special damages. The case cited in Wilson is a leading case & goes to establish the preceeding position. But authorities previous to to the case in Wilson, recognize different principle.

The venue in an action for a libel need
1 Term. 571. not be laid in the County in which the libel was
647. printed, for it circulates in other Counties.

In an action brot. on a libel for a civil
3 B&C injury, the defence is the same as to an action for words spoken.

All libels whether upon pri-
3 Bar 492.
Stra 498.
3 B&C..
4 B&C..
Esp 518. vate persons, magistrates or the government are punishable as public offences. It was formerly doubted whether the truth could be given in evidence in an action founded on a written, or pictured slander. It appears now settled that it may, as in other civil suits, but cannot on a criminal prosecution.

In Com it may be given in evidence on a public prosecution, by Statute.

Of actions for a vexatious Lawsuit.

Namely bringing vexatious suits against another, duly set himself to an action to recover damages

But this cause is not to be ranked with those that maliciously cause the Pltff. to be prosecuted criminally —

In this latter case the loss of reputation & personal danger of punishment, are the principal rule of damages, whereas in an action brot. for having been put to expence &c. by a vexatious suit, that expence whatever it can be proved to be, is the rule of damages —

But in order to entitle the Pltff. to recover for this cause, there must be much more in the case, than that the Deft. brot his suit against the Pltff. & failed —

The following are the three sets of cases in which this action may be brot. —

1st Where he sues in a Court that hasn's jurisdiction of the cause, whether the jurisdiction of the Court be superior or inferior to the claim — but it must be averred in the declaration, & proved that the Deft. knew that the Court had not jurisdiction, & that he brot the action maliciously — The case of Goslin vs Wilcox

Esp 526.
2 Swift 53
Styles 378.
B.N.P. 11.

2 Wils 307. however, allowed the Pltffs declaration to be good. altho he did not aver that the Deft. knew that the Court had not jurisdiction; but it was with some difficulty — therefore the better way is, to always aver that he knew.—

2.— When he sues another when he knows that that he has no demand against him, but his object is merely to vex the Pltff.

Hob. 267. 1 Salk. 14. Esp 527. 1 Saund. 228.

As where a man brot an action against another before the County Court, & the Deft. beat him; & on an action for a vexatious Law-suit, it was proved that he had said that he had no idea he should recover, but his object was merely to vex the other. here the Court determined that an action clearly lay—

Bro. J. 132. 1 Saund. 228. 1 Vent. 12. 46 S.4.—

Where a person brings a second action for the same thing, the first having been determined—

Hob. 265 266.

3.d Where a person for the purpose of vexation and holding another in custody, sues him for a greater sum than is really due, this action lies—

Salk. 14. Stra. 114 The leading case is in Hob. 266.

As where a person for a debt of £40 — for the purpose of holding the debtor to excessive bail & keeping him in Goal sued out an attachment & held him to bail for £5000, in consequence of which he was sometime detained in Goal,

1 Ld 424. Esp 525. 2 Ter 53. 3 N.R. 12.

an action was adjudged to lie for the special injury —

So if the Pltf. attach an exorbitant quantity of property — as for a claim of £4. he should attach £50 worth, an action would lie —

But it has been held, that for arresting the Pltf. in the vexatious, but without cause of action, an action will not lie, unless he held to excessive bail — Esp 526. —

Bac. Ab. 257.

It is not necessary that the first action should have been heard & determined in the Deft.'s favor; for this action equally lies for any groundless proceeding whatever. —

B.N.P. 13. Esp 527.

This action cannot be commenced till the final determination of the vexatious ~~of the vexatious~~ suit, because till then it cannot appear that it was unjust & vexatious — therefore it must be shewn in the declaration that there is an end to the vexatious suit. —

1 Salk 15. Esp 527. Hob. 267.

There must not only be a thing done amiss, but also a damage either already fallen upon the party, or else inevitable —

Esp. 527 B.N.P. 13. Hob. 267.

For mere trouble & vexation of mind this action cannot be brot. & sustained — However if there be any pecuniary damage, this plague & trouble will undoubtedly enhance the damage given by the Jury, for they are generally in such

cases liberal in a tolerable degree —

It has been a question whether arresting debtors abroad, under circumstances which afford no particular benefit to the Creditor but evince a malicious intention is justifiable. The Superior Court of Connecticut have determined that it is not (3 Judges vs 2) They decided principally on the ground of policy, not wishing to make any rule respecting the power to go out of the State to sue, tho both the parties lived in the State of Con. — This was a case in which the Creditor & Deft both lived in the State of Con. And the Creditor went & attached the ~~Deft~~ Debtor in the State of New-York where the Debtor was there on business purchasing goods — But Query as to this decision for great injury is often done in these cases to the debtor, not only by rendering his credit suspicious, but by depriving him (as it must in many cases happen) of the more indulgent laws of his own State, & subjecting him to numberless inconveniences to which he would not be liable if called upon among his friends & his property — Judge Reeve is of opinion that if a Creditor will make use of a legal process to harass his Debtor unnecessarily, without receiving any benefit himself, this action ought to

lie against him —

Where there is a good cause of action as debt due, if a person without the knowledge or direction of the peson to whom the money is due, sues out a writ, & arrests the body of a debtor, he maintain this action against such person, for he was not liable to be sued by him — The same rule must apply in case of a summons, as well as attachments where one sues in the name of another without authority —

1 Salk. 14.
Esp 526.
March 47.
Buller 12.
2 Swift 53
2 Bar 62.

One of several joint creditors may arrest the Debtor without the consent of his companion, & not be liable to this action

12 Mod 380.
1 Salk. 14.

Actions for malicious prosecutions

In an action upon the case for a malicious prosecution, if the Plff. prevail it is usual to give very large damages, not only because the reputation and the existence of the suffrer may be at stake, but because of the bad invidious disposition manifested in the person who procures the prosecution —

Esp 528. 1 Bac 61. 1 Salk 14. 3 H & C 13. Miles 10. This action lies against any one who has been instrumental in maliciously procuring an indictment, information, or presentment against another by which he has been put in peril of his life, or suffered in his liberty, property or reputation —

2 Pry 378. But this action is not sustainable unless the prosecution be false in fact, malicious & without probable cause. By false in this case is meant, not only that the charge was unfounded, but that there was no probable cause, or rational ground of suspicion —

1 Bac 61. Cro E. 130. Leon. 187. Public officers commencing prosecutions upon false informations are not liable to this action, but persons giving such informations, & knowing them to be false are liable. —

1 Bac 61. Cro E. 130. But if a public officer of himself prosecutes maliciously & without probable cause he is liable to an action for a malicious prosecution. If the officer

is in this case the magistrate granting the warrant, Esp. 530. case will not lie, but trespass.

The case in Bro. E. 130. is denied to be Law, for no civil action will lie against Judges for an act done tho' malice in the exercise of their judicial powers, it seems.

B.&R. 1055 2 Term. 231. Gilb. R. 185. 10 Mod. 148. Comyn 161. B.&R. 1141. Esp. 326. ~~B.&R. 1055. 2 Term 231.~~

Does the above rule apply to the conduct of Judges in civil cases? — No — 1 Term 503. 513. 514. 534. 373

Formerly the acquital was the only evidence of the want of probable cause, but this rule is now altered & any proof of falsity & malice is now admissible.

Did this rule ever apply to malicious prosecutions, or to conspiracy only?

3 Bro. 56. Bull. 14. Esp. 531.

It must always appear from the declaration, that the malicious prosecution for which the action is brot., is in some way ended, as by judgment, nonsuit or otherwise.

Esp. 531. Geo 56. 2 Term 225. Doug. 265. 1 Ka. 114. 10 Mod. 208. Hob. 267.

It is always sufficient for the Deft. to shew probable cause — & there is no probable cause, malice may be & most usually is implied but from the most express malice, want of probable cause cannot be implied.

Esp. 528. 4 Burr. 1974. Esp. 528. 1 Term 544.

By probable cause of conviction, is meant such a fact, or such a concurrence of circumstances, as that a candid conscientious man, intent on the good of the public, would think that there was such grounds for suspicion at least, as that he ought to be

tied.

But if a Court of enquiry Conviction before
1 Wils. 232 a competent Jurisdiction, is in all cases, conclusive
evidence of a probable cause—

Acquittal however is not conclusive but merely presumptive evidence of a want of probable cause, but this presumption may be rebutted—

But if a Court of Enquiry, or a Grand Jury, have forwarded a prosecution by binding over for trial in the one case, or by prosecuting in the other, on the complaint of an individual, the party must tho' acquited, shew the want of probable cause — To this rule however there is an exception; if a person is prosecuted by being bound over, or prosecuted for that which is no crime, the burden of proof is thrown on the false complainant, notwithstanding the intervention of a Court of enquiry—

1 Wils 232 This rule was taken from W Gould but the authority above cited does not support it

The acquittal on a defect in the original prosecution is presumptive evidence of the want of a probable cause—
4 Term 247.

Whether there was a probable cause is a mixed question of Law & fact; the facts being given, the question is mere matter of Law—
1 Term 519. 545.

The same distinction it seems applies to the question of malice — 2 T Ray. 1485: 1493—
1 Term 519. 1 Wils 232. 4 Ib. 193.

Formerly nothing but a loss of reputation was a ground for damages in this action; but now dam-
Ch. 528

Salk. 15. 2 Stra 977. Bull. 13 2 Stra 691. — ages may be recovered not only for loss of reputation, but for loss of liberty, for the vexation & trouble occasioned, & for the expences incurred in consequence of a malicious prosecution — 1 Salk. 68-5.

Esp. 531. Doug. 205. 1 Stra. 214. 2 Term 225. — The declaration should state the record of the manner in which the prosecution ended - & also that the prosecution was false & malicious.

But when it can be shown that there is no malice it will exculpate the Deft. from the charge of a malicious prosecution. this means malice in its legal sense, for negligence or wantonness is malice. there must be inexcusable negligence, or a direct design to injure —

1 Salk. 14 21. 1 Stra 691. 977 Cro. J. 490. 6 Mod 216 261. — It is said in the books that there must have been a felony committed (if the case were respecting felony) or there would not be probable cause — that to prove this the prosecutors oath is sufficient — But Reeve supposes this incorrect, & thinks that by far the better opinion is that on this subject, that there need not have been a felony committed, & such has been the decision of the Supr. Court in Con. —

2 Stra 910. 1 M. 7 Reputation 2 Ca. 79. — When there are several Defts. damages cannot be given separately, but must be given joint by against as many Defendants as are found guilty.

By the Eng. Law in all cases of an action for maliciously indicting the Plt. of a felony of which he was acc

Esp. 524
1 W. Bl. 385.

quitted, there must be a copy of the record and acquittal from the Court where the trial was had & which must be granted by that Court & produced in evidence; the granting of which is discretionary with the Court: & therefore as it is discretionary with them to grant or withhold it, it is usual, it is equal to deny a copy where there has been any at least, probable ground, to found a prosecution on. —

But in Com. the Courts can exercise no such discretion, & every person has a common right to such copies of record, attested by the Clerk of the Court, as are necessary to prove his cause, & which are sufficient in all cases, tho' not granted by the Court, & must be produced by the Plff. in the action, for the purpose of proving every thing respecting the prosecution appearing on record. — 2 Swift. 55.

Assault and Battery.

An assault is an attempt to offer violence to another: as if one lifts up his cane or his fist, in a
3 Hob. 283. threatening manner at another, or strikes at him,
19 Vent. 256. but misses him, or points a pitchfork at him standing within reach of him, or draws a sword or waves it at him in a threatening manner.—

This is an injury for which an action of trespass vi et armis lies.— But actions are seldom brought for
3 Bl. — an assault unless followed by a battery.—

The general rule is, that words alone will not
1 Hawk 263
1 Mod. 3. amount to an assault; tho, what might be otherwise deemed an assault, words may explain
Esp. 312. away.—

In one case, such threatening as prevented a man from attending to his ordinary business, was allowed to be an assault, for which an action lay.— This however, was an action on the Case.

Blackstone says that the assault must be
3 Bl. — accompanied with such words and actions, as would put in fear a man of ordinary strength & nerves.— Mr Reeve does not like this rule, for that which would be no interruption in the business of one man, & would awaken in him no disagreeable feelings would be a most serious misfortune to one who did not possess ordinary firmness.— What would

Assault & Battery.

be actionable therefore in favor of one man, would not, or ought not to be actionable in favor of another —

But when the action would be supportable & when not, would depend upon the relative situation of the parties, & perhaps their peculiar situation at the time — Mr Reeve therefore apprehends that trespass on the case may under certain circumstances lie for such words, as a man of ordinary strength of nerves would not mind. —

A Battery is the actual exercising some violence on some — it is not necessary that it should be a blow, for spitting on a man or throwing water on him is a battery

1 Hawk 263
3 Lev 404

It is not necessary that the act be done insolently for to wantonly whip another's horse, in consequence of which he runs & hurts his rider, an action will lie. To constitute a battery there must have been either an unlawful act, or an act whether lawful or unlawful, unfairly or negligently conducted —

It does not excuse a man that he did not mean, or had no intention to do the act.

Sta 596.

But if he is not guilty of any blame, or negligence, as where he is pursuing his lawful business, he is excused — as if a soldier by exercise

Hob. 134. by accident shent his companion, it is not actionable —

A man is hunting game & in firing at it, he wounded a person whom he did not know was there, he is excusable for the act of hunting is lawful —

But Wherever a person is

Bub. 16. pursuing an unlawful act, & in doing injures ~~it~~ another, an action will lie, whether he is guilty of

Esp. 313. negligence or not — as if a man should go into ~~an~~ ~~Mans~~ a lot to shoot another horse, & by accident wounds a man, he is liable —

But in case of recreation, as playing, fencing with foils

Co Lit 226. 228. if the parties mutually agree it & an injury ensue, no action will lie — except perhaps there should be foul play —

It is laid down in the Eng. books that where

Esp 313 Bull. 16. the persons agree to go out & fight, & one sue the other

2 Sw. 174. for a hurt given him, the agreement will be of no avail

B.N.P. 16. to the Deft. such agreement & fighting being unlawful.

But Mr Reeve questions very much the propriety of this principle — On a criminal prosecution there is no doubt of its correctness — the agreement would be of no avail — But in a civil suit altho the injury be purposely done, yet with what an ill grace does one of the parties come into Court & claim damages for the breach of that law, which by express stipulation he agreed to

to break — Mr Reeve thinks it more agreeable to Law, to policy, & to reason, that the Pltff should not recover —

There are many cases wherein a Jury upon a consideration of the circumstances, do not think that in Justice the Pltff should recover any thing at all if that he had been served right enough (as where for violent abuse to the wife the Pltff was carried upon a rail) — But having received an injury which they find to have been committed the Law obliges them to give some damages — as a penny — But Mr Reeve ~~that~~ thinks that in such case the Jury ought not to be compelled to give any thing — for if they may whittle it down in this manner, to amount in effect to no compensation, why give nominal damages; But it is said the Jury ought to give some on account of the flagrant breach of the law —

The principle is too often introduced to aggravate the damages, in a civil suit; but it is essentially wrong — If a man has been guilty of an open insult upon a violation of law, is he not ~~guilt~~ punished ~~twice~~ for it criminally, or liable to be so punished? If then the Jury give higher & vindictive damages, or any damages at all in the case put, the Deft evidently gets punished twice for the same offence — than which nothing is more contrary to the spirit of the Law. —

However, there may be some cases where the law not having provided for its own vindication, it may be proper to introduce the principle — as in case of slander in Eng. —

The act causing an injury to the Plff. need not
Ep 313. proceed from the immediate assault or act of the deft. for any wanton act by which another person or thing causes a battery will maintain this action — as where the Deft. threw a lighted squib into the market
3 Wils 403. place, which being tossed from hand to hand
2 Bl R 892. in their own defence, at last hit the Plff. in the
1 Mod 24. eye & put it out — The action lay tho, the injury was not occasioned by the immediate act of the Deft. himself —

So if one push a Drunken man against
Ep 313. another & hurt him, this is actionable as an assault
B N P 16. & Battery — But if he intended to do a right act — as where one man seeing another lie drunk in the street, & out of pure phylanthropy (not Jeffersonian) & to conceal his shame was pulling him into a house, & he accidentally got hurt, & then sued the person assisting him, the action would not lie —

So where one was riding a horse which was not very remarkably ungovernable, but which being suddenly affrighted ran away with the rider, & broke another man's leg, the rider was holden not to be liable —

Assault & Battery

But it has been attempted to draw a distinction between horses wild, & wholly ungovernable, & those which have been broke to service. Some distinction might no doubt be used in these cases — but if common prudence be used Mr Reeve concedes, that he who occasions the injury, ought not of course to be subjected, for shall men who are bringing up horses be be compelled to break them in their own fields, & prevented from riding them in the street? —

In a case in Lombardy, it was said
Lomb. 218. that if one licence another to beat him, such
Esp. 313. licence is void, & an action will lie, because it it against the peace — But Judge Reeve supposes that an action at the suit of the party ought not to be, provided the ~~party a~~ Deft. did not exceed the limits of his licence —

Whenever a person is acting under ~~of~~ ~~person~~ any authority given
Cowk. 136. him by Law, that shall be a sufficient justifi-
Esp. 314 cation in this action —
Fuller. 18.

As where an officer has a writ or
Bull. 18. warrant against one who will not suffer himself to be taken, he may justify a beating or even a wounding in the attempt to arrest him —

2 Stra. 1049. But a Battery cannot be justified by an arrest under
Esp. 314. process only, it will only justify the assault, for

to justify a battery, resistance or an attempt to rescue himself out of custody, should be shown, unless it be by way of gentle imposition of hands. in which way only the Deft. may justify beating without showing any resistance or an attempt to rescue —

Every person when commanded is bound to assist an officer in arresting a criminal, therefore whenever a battery is committed in arresting a Criminal it will excuse —

When a man is in a violent passion & about to do mischief, a person will be justified in laying hands on him to prevent him, as it is considered useful to society —

The most usual justification in this action is son assault demesne, or that the first assault proceeded from the Pltff. himself — It is not necessary that the Pltff. actually gave the first stroke, for if you prove that he offered so to do, by lifting up his stick to strike you, it is sufficient justification, for if he had stood till the Pltff. had actually struck him, he might have been disabled by the blow — so that an actual striking is not necessary —

Exp 315 — Buller 18.

But if the person commits a greater battery than is necessary for his defence, it will not excuse him —

Assault & Battery.

Therefore the commission of an enormous battery,
Esp 315. will not be justified by a small assault, for
3 Salk 642. the Law will not protect a man in making use of
this justification as a weapon of revenge.

A man may justify the same assault
Esp 314. in defence of his wife, parent or child as he
Bl Ray 62. may in his own defence. This is as complete a
justification as Son. ass. dem.

So a wife may justify an assault in de-
Salk 407. fence of her husband.

So a servant may justify in
defence of his master. But a master cannot jus-
1 Salk 407. tify an assault in defence of his servant, for
Esp 314. he may have an action against the person who
3 Bac 568. beats him, with a per quod servitium amisit, but
the servant cannot have any such action for
beating his master. Quere this last rule 3 Bac 568.

A man may justify a battery on any one
Esp 314. who endeavors wrongfully to dispossess him of his lands
1 Hawk 263 or to take away his goods; but in case of an entry
on the lands, it must not be justified as a battery,
but as a gentle imposition of hands.

But if a person has actually taken my goods into
possession, I cannot break the peace to retake
them, but if I can take them in a peaceable man-
ner, I may do it.

Where the injury is a mere break

of a person's close, the Deft. cannot justify a
Esp 315 battery without a request to depart; but it is oth-
2 Salk 641. erwise if one breaks down a gate, or enters with
force & arms, for there it is lawful to oppose
force with force —

So where a man attempts to enter
another's mansion, he may resist him with vio-
lence — So if a man enters my house in a
peaceable manner, & after he is in, behaves disor-
derly; I may lay violent hands on him & put
him out —

So in the exercise of his office a church-
1 Saund 13 warden, & (by parts of reason a tything man) may
Esp 314. justify taking off the hat & on laying hands on
one who is disorderly in church, & turning him out
for disturbing the congregation —

So a person may justify even a maiming
Bull. N. 10. if done by him as an officer of the army, as a
Esp 314. punishment to the Pltff. for disobedience of or-
ders, or other military crime —

A parent is specially justified in giving rea-
1 Hawk 359. sonable correction to his child, a master to his
Esp 315 servant or apprentice, a school-master to his
scholar; & it is said a Gaoler to his prisoner —

Where the injury proceeds from the Pltff.'s own
Esp 315 fault, it will be sufficient to justify the Deft. —
as where the Pltff. & Deft. being at play the Pltff.

thrust his money into the Deft's heap, & the Deft kept it, whereupon they striving for the money the Pltff was hurt, for which he brot his action & the court determined that its proceeding from the Pltffs own fault was a good justification for the Deft.

See 366.

It may be observed that where the parent or master exceed the bounds of moderation in correction, they are liable — Now what is moderation is for a court to determine — The schoolmaster (says Reeve) acts in a judicial capacity, therefore if he uses more than he is liable

As to the Declaration

See 829. Esp 316.

In assault & battery the offence cannot be laid on a day certain, & at divers other days and times, for an assault is one entire individual act, & cannot be committed at divers times, nor laid with a continuando — Besides it is impossible for the Deft to know whether the Pltff means to prove one assault or twenty — & therefore he cannot be prepared to justify —

See Lit 283. Esp.

If the act is stated to have been done on one day not the actual day when it was done, yet if upon trial it is proved that it was done before action brot, it is sufficient to maintain the action, provided it is not barred by

the Stat. of limitations. It is the common practice in Lon. not to state any day, but that it was committed within 3 years last past —

The declaration must charge the fact to have been done with force & arms & against the peace or to that purport —

The fact must be positively charged, & not by way of recital — as whereas the Deft. on such a day made an assault &c

1 Sta. 621. Esp. 316.

Where a battery is committed on the wife, the husband & wife must join in the suit & it must be laid to their damage, 1st Because the husband is put to expence for her cure, & in bringing the action, and 2d Because if he dies, the right of action survives to her, on whom the injury was committed.

2 Day 1208. 1 Lev. 387. Esp. 316.

Where an assault & Battery has been committed on both two separate actions must be brot.; one in his own name alone, for the injury done to himself, for the wife cannot join in an action for an injury done to him; & the other in conformity to the last rule above mentioned —

2 Day 1208. 6 Co. 655.

The declaration may lay many things in aggravation, for which the Eff. could not himself maintain an action — as for frightening his his family &c —

2 Lath. 642. Esp. 317.

In this action (as in all others founded on torts) if the Battery has been done by several the

Pltff. may bring his action against all, or part but can bring but one action only — If he brings
Yel. 68. his action against a part only & recovers, this
Esp 319. will bar any action against the others, for a Pltff. shall have but one satisfaction for his injury.

Where an action is brot. against several there
Cath 19. can be no apportionment of damages according
Esp 321. to each one's guilt, for all are principals, all are equally liable.

To this action the Deft. may plead
Bull 17. either the general issue, not guilty, matter of excuse
Cobb 282. or a justification —
Esp. 317.

If the Deft. has been indicted for
2 Hawk 333 the same assault, & he has confessed it, & it is
469. so entered on the record, this will estop him
Esp 317. to plead not guilty to a private action for the same offence.

Whenever the Deft. justifies, he must
2 Hawk 637. confess, or on demurrer, the Pltff. shall have
Esp 318. judgment
Bull. 19.

If the Pltff. has once recovered dam-a-
Esp 319. ges for the assault & battery, he cannot afterwards
Bull. 19. recover in a new action for any further mischief or injury arising from the same battery — As where the Pltff. had recovered damages for the battery, a
Salk. 11 piece was cut out of his skull in consequence of the former wounding for which he brot. a new action

but Holt Ch Justice held it would not lie.

In conformity to this decision was the case of Gov. Chittenden, before the Supr. Court of Con. A battery was committed on Mr Chittenden which injured his eye. he sued & recovered damages; after this recovery by means of the wound he entirely lost his eye, for which he brot a new action, but it was determined not to lie,

Salk. 11. for the consequence of the battery is not the ground of the action, but the measure of the damages.

The Stat. of limitations may be plead

21 Jac. 1. ed in bar to this action in England, where it is not commenced till the expiration of four years after the battery is committed.

The Stat. of limitations in Con. is 3 years, & it may be given in evidence under the General Issue.

A Judgment in a criminal suit for this of-

Esp 320. 1 Sta 68. 1 Ld 325. fence, can never be given in evidence in a civil suit for the same offence; for in the ~~civil~~ criminal suit, the person injured may be a Witness; therefore it would be allowing a man to testify in his own case.

In an action by Baron & feme for the battery

1 Sta. 480. Esp 321. Bull. 21. of the wife, under the general issue proof cannot be admitted, that she is not the Plfs wife, for it should be pleaded in abatement, - that the Plff might

meet the objection fairly.

It is a general rule, that the Pltff. shall be recompenced but once for his injury, tho it be done by several, & tho his action be brot. joint or several —

~~11 Co. page 6 & 7.~~ As in Sir Jno. Hey dons case 11 Co page 6 & 7.

So in this case where an action was brot. against two ~~a~~ ~~more~~ one pleaded not guilty, the other son assault dem. & both issues were found for the Pltff., it was determined that there should be but single damages assessed

So. 118. Ep. 321. Cro. J. ~~315.~~ 350

So if one demurs & the other pleads not guilty & both found for the Pltff., whatever the verdict of the Jury is, judgment will go against both the Deftts for the sum — & if the one who demurs succeeds in his plea, both will have equal benefit of it —

11 Co. 6. 7.

Again; suppose one suffers a default, & the other pleads not guilty, goes to trial & a verdict goes against him for £ 600. here the Execution must go against both for that sum: but if on the plea of not guilty, the Jury acquit him that pleads, it likewise acquits him who suffers a default —

Stra. 1222.

Therefore where the Pltff. declares jointly, the Jury cannot sever the damages, so as

Carth. 19.

6 Co. 5. - to give more against one than another — But
Bull. 20 if they find otherwise the Pltff. may enter a
nolle prosequi against all but one & have
Judgment against him —

But the Jury may find some guilty & others not.
Ep. 320. In Eng. & some other places (but not in Conn.)
2 Roy. 176. after the Jury have returned their verdict, the Court
Ep. 322. on viewing the wound occasioned by the battery
may increase the damages where the wound a-
mounted to a mayhem — but subject to a num-
ber of restrictions —

There is no distinction in Con.
as to mayhems; they are merely considered as
atrocious batteries —

If A. sue B. & C. if they both
be joined in an action for it, & they both put in ~~different~~ same pleas, the Jury ~~sometimes~~ think proper, to
sever & apportion the damages between them — They
may bring in therefore that B. pay $50 & C. $40. —
In such case the verdict is bad, if A. elect
to treat it as bad & set it aside; but the Deftts.
are bound by it if the Pltff. chooses to treat it as
good — But in such case the Execution can go
out only for one of these sums — A may therefore
take out execution for $50 — & since A. has a
right to look to both or either for his recompence
the execution goes out against both, & as in the

the former case may be levied on both, or on one only at the election of the Plff. — Thus C. who was awarded to pay only $40. may be compelled to pay the whole $50 — But if the Plff. object to the verdict the Court will not accept it, & the Jury will be sent out again — Chitty concurs that no substantial reason can be urged why execution should not be taken out for the whole aggregate sum of $90. but so the rule is —

Cath 18.

The construction of the action of trespass is peculiar in this respect. viz. that a number of distinct battories upon the same man by different defendants, may be joined in an action against all. The Jury having found the different times when the different trespasses were committed, may proceed to apportion the damages between each.

Co. 5.

False Imprisonment

The only violation of the right of personal liberty is by false imprisonment

3 Bl. 127. Esp. 26. False imprisonment is defined to be an unlawful restraint of one's
2 Inst. 589. 5 Bac. 169. liberty, or rather a violation of one's right of lo-
Finch L. 202. comotion

There are two requisites necessary to constitute
3 Bl. 127. false imprisonment: first that one's person be de-
tained, & secondly, that the detention be unlawful

The unlawfulness of the detention consists in the
3 Bl. 127. want of authority. Authority may arise from
Esp. 834. some legal process, or from some special cause,
amounting from the necessity of the case to a justification — as in the case of arresting a felon by a private person.

Every arrest of a person for
5 Bac. 169. a civil cause which is not warranted by legal
2 Inst. 51, 2. process, is an unlawful restraint of liberty. —

To arrest a person for the battery of another amounts to false imprisonment. ~~by confining a~~
5 Bac. 169. ~~person arrested~~ & any custom to arrest without
2 Jones 147. legal process, is not good —

A private person is not guilty of false im-
5 Bac. 169. prisonment, by confining a person arrested by a
2 Rob. 561. proper officer, at the officers request —

False Imprisonment.

The most common cases of false imprisonment are those of arrest in the false or void process.

2 Bl R 1141 Esp 326 12 Co 23 24 Salk 396 Cowp 172 2 Ray 467

In Eng. a Judge of a Court of record of general Jurisdiction, it seems, is not liable for any judicial act whether it happen thro' mistake or malice, if he confines himself to his proper jurisdiction.

1 Term 503 534, 5, 7, 8, 13, 14. x 10 Co 70 1 Hawk 86. 59 Fee

The reason of this rule is that no proof can be admitted, in this case, against this "vehement" & violent presumption in favor of the Judges integrity.

2 Bl R 1145 Salk 396.

But if a Court of record of even general jurisdiction, transgresses its jurisdiction, as to the subject matter of acts maliciously, the Judges are liable; - for here they do not act judicially - Yet if in transgressing their jurisdiction they merely make a mistake - it seems they are not liable.

6 Term 412 2 Bl R 1145 2 Ray 434. Salk 396. Stra 893 Esp 331. 8 Co 114. Esp 326

Judges of a Court of limited jurisdiction are liable for their mistakes, if in making them they transgress their jurisdiction - Yet if it appears that the Judges of a limited jurisdiction, act maliciously, but within their jurisdiction, they are not liable. tho' this is a question.

1 Term 536. Esp 338, 9. 1 Term 593. Stra 710. Croke 286.

Courts not of record as Justices of the peace in Eng are liable at Com. Law for any mistake of Judgment. Quere. If he be acting judicially, & within his jurisdiction

will he be liable? The rigor of the above Common
1 Bl. 354. Law rules is mitigated by several ~~Statutes~~

When a Justice issued a warrant for the col-
1 Bl. R. 354 lection of a rate illegally assessed, which auction-
1 Burr 595 ed the Off. to be arrested, ~~he~~ he was holden lia-
1 Burr 536 ble. — But perhaps it was on the ground of
its being a ~~mistake~~ ministerial act — But where
the Justice had committed a person, which was a
judicial act, he was holden liable, because he did
not proceed according to Law — The extent of their
liability is not precisely settled in all respects. —
But the Court of Kings Bench will not ~~grant~~
1 Burr 653. grant an ~~imprisonment~~ information against
a person who appears to have acted uprightly. —
Quere Whether Justices of the Peace have not
the power of committing a pauper for refusing
to answer questions relative to his settlement?
I apprehend they have. —

All Courts which have the pow-
2 Ray 467. Salk. 200. er to punish by fine & imprisonment, are consider-
Carth. 491. 3 Bl. 25 ed as Courts of record. — By fine & imprisonment
12 Mod 386. is meant where the confinement is for the purpose
Contra. of punishment, & not to compel ~~an~~ an answer —
2 Bl. R. 1146. This position is denied to be universally true, that
a power to fine & imprison makes a Court of
record

— In Exr. or Admr. cannot be arrested on
Esp. 326. 3 Wils 368.

the mere grounds of a duty transmitted to him, which was incumbent on the testator or intestate. But he may be arrested on a suggestion of a devastavit, & that only —

3 Wils 345 do 377. False imprisonment lies in this case against the attorney or the original Deft. — but the rule is general, that an
2 Bl R. 1192 attorney who is instrumental in causing an illegal arrest, is liable with the principal.

10 C 76 b. In this case I apprehend the Officer would
2 Wils 386 not be liable, the subject matter & person being
Esp 391. amenable to the Court, & the cause of action
1 Sw 95. 710 having arisen without its local limits.

Exemptions from arrests are sometimes
4 Com 475. 4 Bar 222 in Eng. connected with the character of the in-
2 Rob 273. dividual, as in the case of an Ex. Sometimes
1 Bl R 636. 5 Bar 971. it arises from temporary circumstances, or par-
Cro J 378 ticular Privileges; as in the case of attendance
Comp 378 156. on Courts — as a suitor or a witness — The pri-
Esp 327. vilege of a suitor extends to his horse, money &
2 Bl R 1190. 1191. necessaries — as well as to himself — In the lat-
1 Bel 220. ter case the arrest is not illegal in the first
4 Bar 664, 5. instance; but a supersedeas issues; after
3 East 89. 8 T R. 535. which, detention is illegal, & an action lies; for
Doug 671. it is the privilege of the Court & not of the party — Tho tho the officer when arresting in the first instance knew of the privilege, he is

not liable. The writ in this case is not void but the suit continues.

The privilege is disallowed in cases of collusion - as in vexatious actions, it being discretionary with the Court to allow it or not. So where the party attends as a volunteer, upon a pretence or with a view of answering a process when there is none.

2 Bl. R. 1193
Cowp. 9.
1 H. Bl. 636.
11 Mod. 79.
Salk. 544.

A Gaoler or Sheriff is not guilty of false imprisonment in detaining a person for the payment of his fees either in Eng. or Con. But it is otherwise, I suppose, where he detains him for his board.

5 Bac. 171.
2 Inst. 53
1 Root. 158.

If the order of a Court be, to commit a person in a certain prison, the committing him in any other prison is false imprisonment.

Salk. 488
5 Mod. 295
5 Bac. 171.

A peace officer is justifiable in arresting a person without a warrant, on a charge of felony, even if there has been none committed.

Lang. 334.
335.
4 Bac. 517.
1 Rob. 43.

It is otherwise with a private person for if he arrests another on a charge of felony, when none existed, & without a warrant he is guilty of false imprisonment. But if he suspect him on reasonable grounds of the

Cap. 334.
5 Bac. 171.
Lang. 345.
1 Bulst. 150.
2 Hawk. 82.

not instigated by malice, he is not liable altho' the party arrested be innocent of the felony—

An original arrest in a civil action on the sabbath, is rendered void by the Stat. 29 Car 2d & consequently the officer making such arrest is liable to false imprisonment—Yet in public prosecutions the arrest is good.

Esp 327. 605. 5 Mod 95. Salk 78. 4 Bac 456. 1 Sem 265. 2 B&A. 1195.

At Common law an arrest on sunday in civil cases is good 2 Bulst. 72.

B&A 1195

It is said that a bail may take his principal on the Sabbath, for he is in the nature of a Jailer; the principal is regarded as his prisoner, & the taking by the bail is considered as a retaking on an escape. But this rule is denied to be law by Blackstone.

Salk. 626. H. 148 Esp 605. contra B&A 1279

The breaking open outer doors to serve a civil process, is unlawful, & therefore the party is liable for false imprisonment. But if one enter any outer doors he may break open any inner door; for the illegality arises from the breaking an outer door—And if a stranger enter into the house of another, the outer door of that house may be broken to arrest him

5 Co. 93a Cowper 1 Hob 62. 2 Bac 367.

It has been questioned whether if an arrest is made on sunday or otherwise illegally made, whether the execution of the process is

2 Bac 367. 2 Sup 285 1 88 contra 5 Co 93.

Comp. 1. 9. Ep. 604, 5. Cro E. 908. Finch 383 — good, if the only remedy by action, or whether the execution is void & may be set aside in a summary way discharging the person arrested.

It appears by the Com. law that all judicial acts on sunday are void.

But this rule did not by the Com. law extend to ministerial acts — for all service of process on that day was good. Very early however Statutes were made making void arrests made on persons while attending upon public worship on sunday, from time to time prohibiting persons from exercising such of their secular concerns as were attended with noise & tumult. And at length the Stat. 29 Car. 2d enacted that all service of process on sunday, except in cases of felony or breaches of the peace shall be void to all intents & purposes. To arrest a person therefore in a civil suit on sunday would be false imprisonment. But in criminal cases the Deft. may be arrested on sunday. So Bail, on a bail piece may take their principal on sunday; but this is not the service of process; for the principal is supposed in the custody of the bail.

Cro Ed 227. 9 Co. 66. Cro J. 280. 1 Salk 785. Mod 95

The bailpiece on which the principal is taken gives no authority of itself but is merely evidence of a right to take, & Mr Reeve supposes with it the bail may pursue the

the principal out of the State.

So also a process for contempt issuing from Chan. may be served on Sunday. This rule proceeds upon the supposition that the person is in the custody of the Court. It is however stretching the principle a great way.

1 Ath. 55.

And out of this Stat. (29 Car 2.) which has made the foregoing provision, out of this provision has grown a question of much importance. But which tho it must frequently have arisen must never have received a judicial decision. Suppose A. be arrested in a civil suit on Sunday, & facilely detained until monday, & then served with another process. On this question there is a diversity of opinion. some maintain that the last arrest is valid, others hold to the contrary opinion, of ~~this~~ the latter opinion is Judge Reeve. The principle has been decided both ways.

In Semaines case the Court held that in such case the second arrest would be good.

5 Co 92.

It is an illegal act for a sheriff in a civil suit to break open outer doors to serve process, & if he do will subject himself to an action ~~at law~~ tho at the same time, the service would be good.

This decision applies in principle, strictly to the case under contemplation. The detention

an sunday is an illegal act — the service being void, and if this decision be law the arrest on sunday is valid —

But Mr Reeve apprehends that the law has undergone an alteration, which is fully evinced in the case of Lee & Gansel — This case did not necessarily decide the point, but the judges thought the case went upon this supposition that such service as the officer was enabled to make in consequence of an illegal act, should be utterly void —

Comp. 1. That the 2d arrest is good See 5 Mod. 95. 6. Comp 6. 9 5 Co. 93

Mr Reeve thinks it a precaution of reason, justice & policy for a Court to suffer any good to arise to a person from his breach of the salutary laws of society when it can be avoided, for it is holding up the strongest inducements for their breach. There are cases however in which it would not be proper to enforce this doctrine as principle — as where A. wrongfully takes B's horse B seeing him, rode him off, forbids it and demands the horse, & upon A's refusal to deliver him, strikes him off with a club. Now the law in such case permits B. to retake his horse peaceably, but forbids such force, but tho' B is very properly subject to an action for the assault, yet it would be improper to compel him to redeliver to A. the horse — In cases of forcible entry & detainer, however, even this is done. —

That the 2d arrest is not good. See Comp Farmer vs Barnes 400. Wells vs Dassel Hob. 63. 202. Comp 4. 10 Ath. 153. 2 Bl. R. 823. 2 Burr 1048. 1050. 6 Mod 95 154. 4 Bur 456. 5 Bur 170.

False Imprisonment.

It has been questioned whether if an illegal arrest is made in consequence of which another arrest is made, which would otherwise have been good, the latter is valid. It is settled however, that the 2 arrest is valid, if there has been no collusion between the parties.

2 W.R. 893.

An officer is liable to false imprisonment if he arrest any other person than the one designated, even if the person whom he arrestd, declared himself to be the person sought for

Cro 328. 3 Com 490. 3 Rob. 553. Moor 457. Rand 323

It is very questionable whether this rule will be adopted in Com.

A private person may without any express warrant arrest persons who are actually fighting, & restrain them till their passions subside

5 Bac 171. 1 Hawk 136. 2 do: 81.

A feme covert is not liable to be holden under an arrest on mesne process, that is, the Court will discharge her on finding common bail. Yet in this case, I conceive, no action will lie, the process I apprehend is legal, tho the service is sometimes set aside & the feme discharged.

Cro 327. 2 Sha 1272. 1 Term 486. 2 Bl R. 720. 1193. Doug. 648. Salk. 115. 2 H Bl 617. 1 Co 76.

It is a general rule that an express warrant for the arresting of a person ought to be in writing

But it is laid down in one case that the confining of a man for a short space of time, under the parol warrant of a Justice of the peace, for further examination, is not a false imprisonment.

5 Bac 172. Moor 409. Cro E. 829. 1 Ol

Yet it is said in another case, that such confinement ought not to exceed three days

A private person may without any express
5 Ba. 172. warrant, confine a person disordered in mind who seems inclined to do mischief to himself or any other person. —

Of the liability of officers

Esp 391. If an officer makes an arrest on a process from
Bulle 82, 3 the face of which it appears that the Court issuing
Hard 480. it had no jurisdiction, he is liable according to
D Ray 230. the current of authorities, from whatever cause
Cowp 20. the defect of jurisdiction arises —

But this rule has been extended
10 Co 76. much further — It has been holden without any
Co J. 34. regard to the circumstances, whether the defect
Esp 337. 398. appears upon the face of the process or not, that
2 Wils 385. when the Court has not jurisdiction of the cause
contra from whatever quarter the defect of jurisdiction a-
D Ray 230. rises, the officer would be liable —
Sta. 509.
710 993.

Such is the reasoning laid down in the Mar-
10 Co. 76. shalsea case: but this has been denied — And it
is laid down by a number, together with J. Reeve
Sta 993. that neither the party nor the officer, are bound to
2 Mod. 195 take notice whether the cause of action arose out
Cowp 18. of the jurisdiction: this is contrary to the resolution
1 D Ray. 230 in the Marshalsea Case — But if the cause
2 Wils 382. of action arose out of the jurisdiction of the Court,
the Deft. ought to plead it; if he does not the
affair of the jurisdiction is over, & he shall not
take advantage of it in any collateral action
against the Plff. or the officer who executes the
process —

Liability of Officers.

Notwithstanding all that has been said in opposition to the resolution in the Marshalsea Case still it seems to be law in Eng. viz: that where

Esp. 391. Hard. 480. 2 Ld. 2 Term 65-3.

the Court ~~not~~ finding the process has no jurisdiction of the subject matter, every thing done under it is absolutely void, whether it appears or not upon the face of the process—

1 Esp. 329 2 Mod. 705. 844.

Where the Court has jurisdiction of the subject matter

Secus—

2 Wils 324. 10 Co. 76.

1 Officers are not liable for their acts done in pursuance of the commands of the Courts of Westminster Hall, tho' the writ be void

But this does not hold where the Court has not jurisdiction of the subject matter—

2 Term 231. Stra. 710.

Where the jurisdiction is complete, & the process is malicious & unfounded; the officer is justified tho' the Court, or magistrate, as the case may be, is liable—

Stra. 710. 2 Term 231.

Where a Court having jurisdiction of the cause proceeds improperly, still if the process appears regular, the officer is justified—

Bull. 83.

According to the weight of authorities the rule in Eng. seems to be, that where the subject matter is out of the Courts jurisdiction, the process is void, & the officer is liable; but where the want of jurisdiction is as to the person, or place, the officer is not liable unless it appear from the face of the process — But the latter branch of this rule tho' true of mesne pro-

cess, applies not, it is said, to final process, if sued by superior courts without qualification — Thus where an arrest is under final process of an inferior court, the officers justification must shew that the cause arose within the jurisdiction, or that it was so laid —

Cro J. 314. But tho' the process under this qualification justifies the officer; the original petitioner is liable — He is bound to know the extent of the Courts jurisdiction, & to shew it, & where the cause of action arose — And the original Deft., now Pltff., is not barred, by having pleaded to the first action —

5 Bac. 170. 1 Ray 130. Lutw. 937. 156 1 Vent. 130. In D'Raymond it is denied, that even the original Pltff. is liable in this case; & the doctrine has been approved in Com. by two Judges Law & Elsworth — Winby. 111 —

Esp 331. 8 Co 114. Salk 468. 1 Stra 710. In some cases where the jurisdiction issuing the process is limited, the process is void, & the party & the Court are liable, when the jurisdiction of the Court over the cause is complete ~~as~~ ~~the~~ as to subject matter, person & place, as where an authority by statute is not strictly pursued —

Esp. 882. 1 Sem 536 If the original arrest was lawful, yet for any subsequent oppression this action lies, against the Court or as the case may be, the officer — as where

wanton cruelty was exercised in confining a prisoner in a dungeon without air.—

So where a Constable detained the Pltf. till he paid a greater sum, than would be demanded by law — he was considered as a trespasser ab initio —

1 Wils. 153.
Esp. 332.

In other cases the process even of the Courts of Westminster Hall or any Court, is called void aside from any objection to the jurisdiction of the Court, if the Pltf. in the process is liable to this action. Thus where a writ is not returnable on a day certain, the process is void, tho' the contrary opinion has been holden — The officer however is not liable in this case, the process being from a Court of Westminster, tho' the irregularity appear on the face of it —

Esp. 328, 9.
3 Com. 491
3 Wils. 341, 345.
Salk. 706
Bac. R. 845

The last rule applies to mesne processes only — There is a distinction as to the operation of this rule between mesne & final process, which is, that to a capias on mesne process, the return of the precept must be set forth, but on the final process it is unnecessary — for the Pltf. has the effect of the writ —

2 Mod. 58.
Comp. 21, 2.
1 Mod. 81, 2.
2 Salk. 86.

But if the original Pltf. be sued, he must view not only the final process itself, but the judgment on which it issues; for there must be a subsisting judgment —

Salk. 405, 9.
Esp. 333.

It is a general rule that an arrest under an irregular process is void, or under a process of arrest founded on an irregular proceeding — as where an arrest was made on an execution issued on a judgment set aside for irregularity —

Gh. Ray 73. 1 Lev. 95. 1 Lid 272. 1 Wils. 165. Esp 329. 391. 1 Stra 509.

A distinction is taken between process irregular, & process erroneous — Bl. R. 987. —

1 Stra 509. 3 Wils 345

If it be irregular it proceeds from the fault of the party or his attorney, & therefore the party is liable — But if it be erroneous, it is considered as the fault of the Court, which exculpates the party — In the former case it is absolutely void, but in the latter it stands valid & good until it be reversed —

The process of arrest has been holden irregular & void in the following cases; first, when it has been filled up without proper authority; & 2d when it has been issued informally

2 Wils 47. Stra 993.

A process, tho irregular, if it be issued by any supr. Court of Westminster Hall, it is a justification of the officer executing it, but not of the party in whose favor it issues —

Esp 391. 1 Lev. 395. Stra 509. 1 Bls 76a. 6 Co. 54a 3 Wils 345

But an irregular process issuing from an inferior Court, or any inferior authority; does not justify even the Officer who executes it —

2 Wils 47. 385. Stra 993. Contra Esp 399 1 Hale P.C. 150.

All arrests made under general search warrants are void — So general warrants of any

2 Wils 376. Rudy 213. kind are illegal, as a warrant to arrest the author of a libel whenever they are.

The requisites of a search warrant are these 1st Every search warrant must be granted on the oath of the informer — 2d The grounds of the suspicion must be sworn to. 3d The search must be made in the day time by a known officer — 4th The warrant must be served in the presence of the informer — 5th It must be directed to some particular place — and 6th It must be against the person suspected of having the goods. Where these rules have been observed, the Justice & officer are both excusable — But the informer is justified, or not, by the event, that is, he is justified if his suspicions are verified — otherwise not —

2 Wils 291. 2. Esp 399. 377.

Where the officer serving a process, justifies under it, he need shew only the writ or process itself, & that it is returned, if returnable —

Esp 333. 7. Geo. 52. 2 Mod 563 Stra 1148. Carp 20. Salk 409. Croke 257. 322.

In Eng. the Sheriff's under Sheriff is not obliged to shew the return, because his power extends no further than to the execution of it —

But if the original Off. is Deft. he must shew a Judgment as well as execution, in case of final process, for Judgment may have been reversed before the arrest, & the original Off. ought to take notice of it — The same rule applies

Esp 333. 4. Salk 408. 409.

when an action is brot. against a stranger, who acts for another: for he is considered in the same light as if he were acting for himself.

But if he acts in aid of an officer, he will be no further liable than the officer would have been.

If a Sheriff do not return a writ when he is bound by law to do it, or make a false return; he may as in other actions of trespass be treated as a trespasser ab initio. This rule varies from the general principle of law, viz. that a misfeasance is necessary to constitute a trespass by relation.

5 Com. 581. 2 Rob. 563. 1 Bac. 162. 1 Salk. 409. 2 Ray. 632.

When this action is brot. against the original Deft. & the officer jointly they may sever in the defence; for the writ might be a good justification for the officer, & not so for the Deft. — And so e converso. But if the officer join the original Deft. in a plea which is insufficient as to the latter, he loses the benefit which he might otherwise have had. & if the plea be bad as a justification for the other, Judgment shall also be against him, & vice versa.

Esp. 386. Str. 993. 1184. 509. 1 Wils. 17.

When any false imprisonment has been done by the influence or procurement of another, this action will lie against the procurer.

Co. Lit. 57a. Salk. 407. 2 Vaus. 512. 3 Wils. 377. 5 Com. 579. 2 Bl. R. 983. 1055.

415

416

Replevin

This action is to redress a private wrong to the property of the Pltff., by an immediate invasion of it.

The word Replevin is interpreted to signify the substitution of one pledge in the room of another.

I. The Writ is brot. in Eng. for two causes, 1st when property is distrained for rent 2d where cattle feare distrained damage feasant.

Bac 509 Anciently, Landlords distrained property at pleasure for rent arrear, & the tenant had 4 Bac 373 3 Hb 6. 12 147. no remedy in case of hardship or injustice.

But afterwards this writ of replevin was 4 Bac 373 granted.

II. In Com. the whole of the Eng. Law respecting distresses for rent is excluded.

This writ applies 2.ly. in cases of distraining Cattle. In common cases of any anoyance or injury done to property, there is no other remedy than to bring suit, & wait the tardy motions of a Court, but in this case the cattle which do the injury may be taken for the injury done, & if the Owner of the cattle will bring replevin & change the security, he is allowed to get possession again of the cattle.

Replevin.

In the mean time the person injured keeps the security until the debt is paid —

The writ of replevin does not therefore deprive the person of his security, but merely exchange it, being compelled before he can get back the cattle or other thing distrained, to procure the bond of some security of unexceptionable person that whatever damages should be ascertained by the Jury should be paid or the cattle returned — as if in the prosecution of the action for the trespass Judgment be recovered; & the execution prove ineffectual, the bond will be forfeited & the Deft. might come upon the security

III. But there is another class of cases where this writ applies in Com. but not in Eng., viz., where the Deft is attached by his property to answer unto suits brot against him — Property thus attached must be considered by the Com. Law as in the custody of the officer or of the Law until Judgment — But the Com. Law has given in this case the writ of replevin whereby the Deft. may retain his property by an exchange of the security — as in the preceeding cases —

IV. Most of the cases which arise wherein the writ of replevin is used are cases of distress for rent arrear —

The Com Law of Eng. was originally regardless

of the rights & privileges of all others than the nobility & great men of the time — This disposition to favor exclusively the rich & great was peculiarly manifested in the law of Land Lord & tenant — Whether rent was really due or not the Land Lord to gratify his tyrannical disposition, or to fill his purse, would distrain perhaps one half of what his tenant was really worth & if the sum demanded was not paid in a short time would sell the property & raise the money nor had the tenant any relief but in the slow progress of a Law suit —

To remedy so great a grievance the writ of replevin was given — This enabled the tenant to redeem his property by giving good security that, what was due should be paid. or the property distrained redelivered — And as every Lord of a manor was surrounded by others who were his rivals or violent enemies, perhaps the tenant was not difficult to find those who would give the requisite security — After distress & replevin the course was for the tenant to summon the Lord as a trespasser at the succeeding Court — If at the trial the Land Lord shows that rent was due, this when ascertained the tenant is awarded to pay — & thus altho' Pltff. in the case. Judgment will go against

him as if he was Deft. — But if no rent be found to be due judgment goes against the Deft. precisely as in the common action of trespass — the jury awarding such damages as they may think proper —

This course for this purpose is wholly excluded in law. — & very little used in the U. States. —

II. The second cause for which this writ issues in Eng. is in common use over the U. States —

Whoever finds in his fields, horses, cows, or other animals doing mischief, has two remedies whereby to remunerate himself for the damage done — to wit, he may commence a suit for the trespass, & wait the determination of a court of Justice, or he may immediately distrain & confine them, both that they may not break in again, and as security for damages done, for while in pound the cattle are considered as in the custody of the Law, & must there remain as security for the damage, unless the parties compromise, or unless they be replevied —

If the parties can agree as to the quantum of damages done & whether the fence was good or not & they come to a compromise, the keeper of the pound will be compelled to deliver up the property — If the object cannot be accomplished by

this mode, a writ of replevin must be sued out, & a bond substituted in the room of the cattle —

See Cowp. 415

When the writ is obtained the Pltff. in replevin, must summon the distrainer to appear at Court as a trespasser — The amount of damage if any are now ascertained by a Jury, and as in the other case Judgment will go for the Deft. who will recover damages of the Pltff. & as if Deft. execution will go against him —

But if the Deft.'s fence was not a good one, i.e. not a lawful one Judgment will go agst. him the injury done notwithstanding, & he will be compelled to pay as a trespasser for confining the cattle, whatever the Jury may say —

In Ben. & in most of the States, the Law has ascertained what shall be considered as legal fence — In Eng. this point is left to the Jury —

But if the cattle entered the ~~fence~~ land over a fence bounded by the highway the Law may be essentially different — for the Comm. Law is, that provided the fence bounded the highway, & if the cattle entering were not commonable beasts they should be destrained & the distrainer should recover damages, altho his fence was bad.

Replevin

Thus if hogs get over a fence from the highway which is a bad fence & do injury the owner shall be liable of the animals impounded, for hogs are not <u>commonable beasts</u>—

There is a Stat. in Con. allowing the several Towns to make by-Laws in order to regulate this & other subjects— The town of Litchfield made a law that hogs if ringed might run in the highway — Before this, & at Com. Law, if any one found a hog in the street he might cause it to be impounded— Thus law preserved the hogs from being thus impounded. But a question arose whether the owner was not liable to pay for all damages they committed, this Law notwithstanding, if they entered any mans field, provided that the fence was bad, or provided there was none? After many decisions that he was, & that they were distrainable, the question was taken up to the superior Court— It was there decided that this being the Law, hogs ~~are~~ were on the same footing with horses, & were distrainable whether there was any fence or not for getting into the Lot of another man—

In respect to fowls geese & Turkeys the Law seems to have made no provision — If they enter the Lot or garden of another, Mr Reeve has

had doubts whether they may not be treated as animals fera natura i.e. killed or treated as the owner or person of the land may think proper — Lawyers on this subject have had different opinions — but if one would see another for killing his hens which were doing injury in a garden, Mr Reese thinks nothing would be recovered —

The following cases occasioned in lean some speculation — A had taken B's cattle damage feasant & impounded them, B replevied them & brot his suit as for this pafs against A. before a Justice — the cattle had done mischief to the amount of $20 — The Justices jurisdiction extends only to $15 — The bond which was given as a security in exchange for the cattle was as the custom is for all the damages &c — As the Justice had no jurisdiction over so large a sum as $20 — which the Deft proved to have been done, the case must of course be discharged — The question then was whether the bond was not discharged since the Judge rendered no judgment, & the case ~~disclo~~ destroyed — The person injured was then as contended deprived wholly of his security — But the question did not receive an ultimate decision, & Mr Reese is of opinion that the bond may be immediately sued upon —

Replevin

This action but by the person whose cattle have distrained is in form & substance of action of vi et armis —

Hob. 52. 2 Bac. 354. Co. of 136. 143.

If the Sheriff or keeper of the pound should suffer the cattle to escape, an action on the case for an escape will lie as in cases of escapes of prisoners from the officer —

III. The writ of replevin will lie in the third place in cases of process by attaching the Deft.'s good, to compel him to appear in Court — This is an entirely beneficial rule, but is entirely unknown to the Eng. Law — But whenever the benefit of the writ of replevin is extended to this class of cases, it becomes the most important division of this title When the benefit of this writ is not extended to this class of cases, a creditor may for a trifling sum attach & take away all the property of the indigent debtor, even his last cow, & thus deprive him of all means of subsistence until the tardy motions of a Court of Justice have decided upon the claim —

But in Con. where a debtor's goods have been attached, if he can procure good security in lieu of them he may replevy his goods & hold possession until the determination of the suit; but in this case the security must be most ample, for it would be wrong to deprive the Creditor of his pledge for his debt without substituting another, at least as good as

the bond of a man in good pecuniary circumstances would be.

The replevin in this case is not a adversary suit i.e. it is not such a suit as action against another as is now to be tried; but the object of it is merely to get back the property & to lay a foundation for a subsequent action on the bond.

The writ therefore is merely entered on the files of the Court but not placed on the docket, or called — In the event of the suit being determined in favor of the Plff. if upon execution non est returned, or if in other respects it be ineffectual, suit may be immediately brot. upon the bond —

A question somewhat difficult of solution has been raised under this Com. Law — A Creditor brings a suit against a debtor stating the damages very high & all the property attached is one cow. A. gives a bond in the common form as security & the cow is replevied — The question is does the obligor of the bond become liable to pay all which shall become due to the Creditor; or is he bound merely to pay the value of the cow — According to the letter of the Law & according ~~to an~~ to the literal construction of the instrument, A. is no doubt bound to pay the whole debt — But Mr Reeve conceives that such ought not to be the construction — The object of the Stat. we should consider is merely to place in the hands of the Creditor as good a security as that which is taken from him, & to place the parties in a relative situ-

ation much the same as that in which they previously were —

4 Sam 433. The case is certainly in analogy to that of giving a bail-bond & the rule ought to be the same.
2 Hob. 36. 547. A. sues B. C. gives a bond for B.'s appearance at Court, B. does not appear, judgment goes by default, in this case if C surrenders up B. any time before a non est is returned his bond is discharged, & yet the bond is literally forfeited — But according to the construction given here is no forfeiture — & the reason is that the object of the Law allowed is merely to place the parties in the same situation as if the body of the Deft. had not been released, & if before a non est has been returned by the Sheriff the body be delivered up, the parties are precisely in the same situation as if no bail bond had been given —

2 Sev 93. . . . . If the Sheriff have a ~~suit~~ writ against A. at the suit of B. & attach the goods of C. being in A.'s possession — can C replevy them? — This question must be answered in the negative — The reason is the writ of replevin counts upon an existing suit between the person replevying, & the person at whose suit the good were attached — in the case put there is none — Trespass vi et armis will lie, but replevin will not —

A question has been raised in Con. whether the Pltf. might not be compelled to take bond of the Deft. himself when the goods are replevied — the Court on fus-

tice said yes, thinking it perfectly good security — This however will not answer the Law, for it would be turning a process by attachment, into a mere summons —

It was however decided that the purposes of the Law were sufficiently well answered in this way — And that the justice who took such a bond acted judicially, & that acting in a judicial capacity he could not be made liable if he did so, for an error in judgment — This decision was reversed by the Supr. Court of the Law settled as above, both for the reasons there given & because the justice did not act judicially but ministerially, — as in a parallel case the sheriff or other officer acts ministerially when he takes bail — This is in a degree a matter of judgment, but still if the sheriff take insufficient pledges he is liable —

428.

Trover.

2 Sw. 100. 360. 15-2 Trover is an action in the nature of an action of Trespass on the case which lies where one means ob-
tains possession of the goods of another by delivery finding or otherwise, and refuses to deliver them to the owner, or sells or converts them to them to his own use without the consent of the owner —

It is a very extensive action for it lies in every case where one has converted the goods of another to his use.

Three cases embrace all actions of
Esp 5 80. Trover — 1st When the Deft. came by them
3 Wils 146. wrongfully. 2d When he came by them lawfully
5 Burr 2657 but has actually converted them to his own use
3d When he came by them lawfully, & refuses to return them tho he has not used them

In the two first cases there is no necessity of
5 Burr 2827 making any demand, because of the conversion.
But in the last case where there is no actual a demand & refusal is prima facie evidence of a conversion —

But if this idea of an intention to con-
Esp 5-90. 5 Burr 2827 2 Bulo 312 4 Ray 752 Salk 655 vert can be rebutted, trover is not the proper action

A refusal to deliver is generally sufficient
Esp 5-90. Croft 195 evidence of a conversion; this however is a fact

for the Jury to determine.

This action is confined to personal property, & cannot be extended to real, — as to corn growing —

Originally, this action lay only in cases where one found the goods of another & refused to deliver them on demand. Hence its name, & hence the practice of declaring that the goods —

5 Bac 265. 3 Com 152.

But it now lies to recover any personal property capable of being identified which has by ~~any~~ any means come into the possession of one to whom it does not belong, & which has been converted —

This action was unknown to the common Law it being like Trover & Ast of all actions on the case given by Stat. Westm. 2d 13 Edw 1st Prior where not actions on the case known at Com Law.

2 Term 128. 3 Com 51. 3 Com 123.

The gist of this action, is conversion, & conversion is proved is proved either 1st By unlawful taking — 2 By an unlawful user 3 By unlawful detention —

5 Burr 2657. 2 Term 462.

A wrongful taking implies in itself a conversion, but when the original taking is lawful, there is no conversion without either an unlawful user, or a refusal to restore the property on demand —

Esp 480. 2 Term 465. 4 Ac 260. Esp 589. 5 Bac 257. Stra 655. Salk 576. 655. Esp 580. 5 Burr 2825.

For an abuse of property in the own-

1 Com 221 as possession the trover will not lie, the proper
Cro El 219 action being an action of trespass. —
1 Sid 264

The Pltf. must prove property in himself, possession & conversion in the Deft. therefore if A finds property, & B. a
Esp 590 stranger claims it without sufficient proof of property, A is not liable to an action of trover
2 Bulst 312. for his refusal to restore it — so that a refusal & a delaiver do not imply a conversion, unless they afford proof that the holder intends to keep the property which he has in possession against the rightful owner — there is demand & refusal evidence of conversion —

But possession is not necessary to main-
Esp 576 tain this action; for a right of possession (or own-
1 Bar 242. ership) is sufficient; as by an Exr for the goods
1 Bulst 68.
Esp 578
1 Com 219. of his testator, tho' they never were in his actual
1 Mod 168.
Cro E. 377 possession —

A finder of goods has no lien on
W Bl 1117. them for his expence. 2 H Bl. 254. —
Esp 585
2 H Bl 257.

If one man is entrusted with the goods of another & puts them into the possession of a third person,
Esp 581. who has no claim to them, it is a conversion &
Bull 131.
1 Term 144
4 Term 260 trover may be maintained for them —

Whenever there is a tortious taking trespass (if
Comp 419. also Indeb Ass.t if the property has been sold) is
Bull 131.
1 Term 144. concurrent with trover. —

Trover.

When the property is destroyed without any taking away, trespass is the only action as if a horse is shot without removing him, but if the property is removed but one rod trover may be maintained

~~fail~~, ~~trespass~~ ~~lies~~ When the taking is lawful trespass will not lie, unless the taking tho' not ~~forcible~~ was fraudulent, i.e. unless the original intention of the taker was to abuse or convert the property taken. — When property is taken with such an intention, the Law considers that in fact there is no bailment — for the fraud avoids the contract, therefore trover or trespass will lie

Bun 2639. Leo Lit 5-7. Moor 248.

It is not necessary in an action of trover to have had an absolute ownership of the property taken, + for if property is taken from a Bailee, either he or the Bailor may recover it in this action, but if the Bailee sues first, the Bailor is ousted of his action against the wrong doer, tho he has his remedy against the Bailee — Yet if the Bailor in this case anticipates the Bailee in suing the wrong-doer, still the bailee tho' ousted of his action of trover, may have an action on the case against the wrong-doer to recover special damages —

+ 1 Mod. 30 5 Bac 261. ee, 1 Rol. 4. Cro C. 377.

It is to be observed in these

cases that the commencement of an action by the Deft. whether Bailor or Bailee, he has a right of recovery, & ousts the other of his action

Judge Reeve supposes that the Bailee ought
5 Bac 164. not to be permitted to maintain trover, un-
4 Leo. 84. less under the circumstances of the case, he
*1 Bac 242. is actually liable — *But the rule is, that the
1 Bla. 69. Bailee can maintain the action, where he may
1 Mod. 31. by possibility be liable — And as every Bailee may be responsible, the rule seems to be actually no less than this: that the Bailee may in every case maintain trover — The Bailor by suing the wrong doer discharges the Bailee —

6 Term 696 A returning of the property after conversion
W Bl 902. will go in mitigation of damages, but does
Esp 581. not bar the action of trover —
1 Bac 221.
5 Bac 266.

The effect of a
Esp 693. Judgment in this action is to vest the property
Sta 1078. in the Deft., unless where it has been previous
5 Bac 257. by returned to the owner —

Trover may be brot. against the first or
1 Wils 8. any subsequent takers, if the original taking
Bac 452.
Sta 1187. was without consent — as suppose B. takes
Cro 6. 89. A's horse, & sells him to C. who sells him to
2 Term 70. D. A may bring his action against either
5 do 176.
Cro J. 262. 683. for tho' D has given a valuable consideration,
Cro 6. 190.

Trover.

Cro E. 746. yet the maxim qui prior est in tempore po-
1 Com 219. tior est in jure must rule —

But when the pro-
1 Salk 126. 2 Ray 738. perty trovered is money or Bank Bills, it is from
Cro E. 746. reasons of policy established that trover can be brot.
1 Salk 284 against the first taker only — but not after they have
1 Com. 222. been paid away in currency —

Trover lies to recover a
1 Com 219. chose in action —

A man's having a special property
1 Mod. 31. is sufficient to enable him to an action of trover a-
1 Com. 218. Esp 577. gainst a stranger, but not against the general
Bull 33. property-man — Therefore trover never will lie in
favor of the Bailee against the Bailor, neither will
trespass; but if property ~~taken~~ bailed be wrongfully taken
Burr 457. from the Bailee by the Bailor, the former may have
an action on the case against the latter to recover
special damages — the action however must not
be called trover —

It has been a question whether the
Cro E. 243
action of trover is barred by the Stat. of limitations.
Tho the Stat. does not mention trover, it expressly bars
trespass. J Reeve supposes, that, ~~therefore~~ where tro-
ver is concurrent with trespass it is barred by the
Stat. for it is the nature of the injury, & not the
form of the action but which ought to determine
whether the legal remedy is barred by such a Stat. or not.

It would be absurd to say that the remedy for the same injury should be barred in one form of action & not in another — The Supreme Court of Errors however have decided contrary to the opinion of Judge Reeve —

Esp 650. In declaring in trover it is not necessary to state a demand, for a demand & refusal, are but evidence of a conversion; & conversion itself is stated. —

Esp 576. The Pltff. must prove property in himself — possession & conversion in the Deft.

It differs from an Assumpsit, in this, that there is no Assumpsit without a demand —

The property in the Pltff. is essentially necessary to recover in this action; yet proof of possession is prima facie evidence of a persons right to sue & recover —

Esp 581. 2 Show 161. Bum 936. 2221. 2 D Roy. 752 Comp 257. 1 Atk. 137. 222. When one has a lien on property in his possession, he is not liable in trover for refusing to deliver it to the owner, unless his demand is paid or tendered — as in case of a common carrier, pawnee &c —

1 Term 153 If a borrower of money on usury having pawned property as a security, bring trover to recover this property he cannot recover without first tendering or paying

the money actually advanced; for trover is an equitable action. —

Esp 587. 2 Stra 809. Bull. 37.

Very great accuracy was formerly necessary in describing property trovered; but now convenient certainty is sufficient in description; — tho' no definite rule can be given in this particular —

Esp 593 Esp 592. 1 Keb. 305. 6 Term 695.

The general issue is almost universally pleaded to this action — It is said indeed by Justice Twisden that nothing except a release can be pleaded — But this rule is unintelligible — The reason is not discoverable & is not adopted in Com. The practice has been to give any defences in evidence under the general issue, & Reeve supposes which may be pleaded specially —

1 Com 224. Esp 592.

An insufficient recovery, i.e, where the Pltff. obtains judgment, but cannot get his money; bars an action against another person — For this rule there are two reasons, first because this action is founded upon tort, & in all torts a Judgment merely is a complete satisfaction altho' no execution be taken out upon such judgment — But this position is not meant to establish the point that no suit or recovery can subsequently be had on such judgment, for this may be done —

In some cases the property which is the subject of the action, may according to the principles of the Comm. Law be brot. into Court & will ~~be~~ go in mitigation of damages i.e. the Pltff. will ~~&~~ retake his property & receive also such damages besides as the Jury will give him —

But no very bulky article ~~will~~ as a pipe of wine &c can be thus tendered — Nor will the Pltff. be compelled to accept the article if injured materially — This rule seems to have been ~~formde~~ formed with a view to cases of actions brot. for family pictures & things of that sort —

One tenant in common or joint-tenant cannot maintain this action against his Co-tenant; because there is property in the ~~Deft.~~ — unless the Deft. has sold or destroyed the thing held in common —

Salk 290

Co. Lit. 200a

But supposing one Tenant in Common he brings this action against a Stranger without joining his Co-tenant — in point of form it is defective, & the Deft may take advantage of it by plea in abatement, & in no other way —

It is laid down that when a servant trovers by the command of his master, the

latter only, is liable — but this cannot extend to a tortious taking — for no one (except a feme covert) can justify a tort on the ground of coercion, therefore trespass & any other proper action may be brot against either — The Servant can therefore be sued in trover only in cases where the master comes by it lawfully, & the servant persists in possession —

Suppose a person finds a feme's goods before marriage & converts them afterwards, the husband may bring trover alone — or join the wife —

A rightful Ex.r may bring this action against one de son tort, & recover all goods of the testators come into his hands, unless he has paid the testators debts, & so far they go in mitigation of damages —

As to the evidence in an action of Trover - See - Gilb. L. E. 534. —

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Trespass vi et armis for injuries done to personal property.—

3 Com. Jur. Div. 5 Bac 157. Trespass in its most extensive acceptation at Com. Law is any transgression of Law short of treason or felony — When not considered as a word of technical import, it is any violation of Law —

Esp 380. 5 Com 174 The word as now used in Law, denotes in its general sense, any misfeasance committed to the injury of another person or property —

Esp 380. In its most appropriate sense the word imports any injuries by force to the real or personal property of another —

The right of personal property in possession is liable to two species of injuries 1st abuse or damage while in possession of the owner — 2d Auction or deprivation of possession — II. Of abuse or damage to personal property without altering the possession —

3 Com. Poisoning one's cattle, or killing one's beasts or doing any act which takes away from the value of a Chattel, falls under this description of injuries —

3 Com. 5 Com 582 Esp — The remedy in these cases if the act is accompanied with force & is immediately injurious, is by trespass vi et armis —

If Case is

but where trespass is the proper remedy, Judgment will be arrested even after verdict & vice versa — says Judge Blackstone the same evidence that will maintain trespass may also frequently maintain Case, but not e converse.

6 Term 125
2 Mod 131.
Cro E 541.
Cro 196.

Every action of trespass with a per quod, includes an action on the Case — I may bring trespass for the immediate injury, & sue on a per quod for the consequential damages, & pass over the immediate injury as in the case in 11 Mod 18

2 W Bl. 897.

So said Justice Gould: "I am persuaded there are many cases wherein both trespass vi et armis & case or either will lie 2 W Bl. 898. —

II. Of Emotion or deprivation of possession —

This species of injuries so far as it is remedial by trespass vi et armis consists in an unlawful taking — an unlawful detainer being generally remedied by detinue or trover —

3 Com.

The action of trespass vi et armis gives damages & not restitution in specie. —

3 Com.

But in some instances where the original taking was lawful, trespass lies for subsequent injuries: thus if a beast is taken as an estray & afterwards worked, trespass lies, if the Deft is a trespasser ab initio, but in other cases it does not —

Cro J 147.
1 Term 12.
8 Co 146.
5 Term 580.
3 Wils 20.

The rule of distinction

3 Com. 313

Esp 388. 405. Bull. 81. 5 Co. 581, 2. 11 Mo. 1218. 5 Bar 161. Yel. 967. Burr 2036. 3 Wils 20. 1 Show. 12. 1 Term 12. Salk 221. 8 Co. 146

between those cases in which trespass lies where the original taking was lawful & those where it does not is this: "When the authority to do the original act is given by law, an abuse of this authority makes one a trespasser ab initio, as in the example of the eshay — So if one enters a Tavern & afterwards falls to breaking glasses tables &c — this is a manifest abuse of the license — the Deft. therefore shall be considered a trespasser ab initio —

Esp 383. 5 Bar 161. 8 Co. 146. 2 Bull 312. 5 Com 581. 3 Com 213.

But a nonfeasance is not such an abuse of the license as will constitute the Deft. a trespasser ab initio — as if the Deft. after drinking his wine had merely refused to pay his bill.

There is one case however which it is contended appugns the position that a mere nonfeasance

5 Bar 162. Salk. 409. 2 May 632

will never be considered such an abuse of a license as to constitute the Deft. a trespasser ab initio Viz. the case of a sheriff or other officer neglecting to return his writ after having made an arrest — in such case no doubt the officer would be liable — But this rule is not correct nor does the case in strictness form an exception, for he is not liable for nonfeasance, but for misfeasance, he being considered as having acted under no authority, because he can in no manner avail himself of the writ till returned — If

TROVER.

then the issuing of such writ is a fact provable only by the record, & as the Sheriff can prove no authority except by proving this fact, it will follow that the arrest is a mis-feasance.

2 Roll. 561.

But where the party gives the licence under which the original act is committed, the other can never be made a trespasser by relation; for tho' the law will punish in case of abuse, the very act authorised by itself, yet it will not allow a party to treat as unlawful, what he himself made originally lawful; as in the case of unlawful detainer or abuse by a Bailee.

8 Co. 146. Yel. 96, 7. 5 Bac. 162. 5 Com. 581.

But tho' a mere exceeding the bailment does not subject the party where, where at the time of obtaining the bail, he had no such intention. Yet whenever the party obtains the article for the express purpose of exceeding his Bail, he will be a trespasser ab initio, for fraud deprives the party of the benefit indulged in other cases of licence given by the party. Co. Lit 57. Moor 248.

So also tho' it is generally true that where the licence is given by the party, a mere abuse of the licence does not subject to this action, yet it is said where he has it for a special & particular purpose, & employs the article for a contrary purpose no way connected with the licence, it does as in the case of a shepherd who has sheep en-

trusted to him, if he kills them — or where he has them for a special purpose, as to dung his land if he kills them — 2 Roll. 556. 5 Com 581. Co. Lit 57.

So if a lessee at will commits voluntary waste by pulling down houses, cutting trees &c — 5 Com 581 Co Lit 57.

So if a servant or assistant entrusted to sell goods in a shop, embezzles them to his own use — In these cases a man is said to abuse the trust reposed in him & therefore will be a trespasser ab initio — 5 Co 13 1 Com 89. Roll. 248.

If the Bailee destroys the thing, it is said trespass lies, for he extinguishes the bailment — but he is not, I conceive a trespasser ab initio. Co Lit 5. 71. Co Lit 57. 6 Mod 248. 3 Bar.

To maintain this action the Pltff must have possession of the goods at the time of committing the trespass; property alone not being sufficient Esp 383. 4 Term 489. 1 do 480. 7 do 9.

This possession may be either actual or constructive — for a constructive possession as against strangers is sufficient to enable one to this action — since it is regularly true, that a general property draws after it a possession in Law — on the other hand a rightful possession gives a special property. 5 Com 577. 5 Bar 164 1 Term 480. 4 do 489. 7 do 9.

So generally any person having the general property, may against a stranger maintain trespass, for it draws to it a constructive poss. 5 Com 577. 1 Term 480.

sion — can a wrongful possession of personal property entitle a person to this action? In the case of real property every possession rightful or wrongful (except a mere intruding possession without a color of title) gives a right to this action of trespass vi et armis — This rule says Judge Reeve as far as it can be applied, holds as to personal property — Gould says that a wrongful possession does not entitle a person possessing to this action; by this he probably means, what would in real property be a mere intruding possession of possession.

Not only he who has the general property, but he who has the possession of goods shall maintain an action for them against a stranger — as an agister of cattle. —

5 Com. 577
1 Term 480.

It is laid down that possession independent of property entitles a person to this action — This tho' a general rule does not hold (says Judge Reeve) in all cases — for where a person is merely bailee to keep, that is, merely a naked bailee, he cannot maintain this action B.N.P. 2 Roll. 251.

5 Com. 577.

for a bailee should not be permitted to maintain this action any more than trover, unless he may by possibility be responsible to the Bailor. And mere naked bailee cannot by possibility be liable to the Bailor unless for such gross neglect as is evidence of fraud, i.e. unless for fraud —

to it would be absurd to say that the circumstance of his having been guilty of fraud should entitle him to an action in a case where he would, if not guilty of fraud, have no right to an action —

The general contemplated by this rule must suppose a right either absolute or conditional of present possession, — as in the case of a bailee to keep, otherwise the rule is contradicted by various authorities —

4 Term 489.
7 do 9.
Ep 383.
Cro Lit 89.

A special property being accompanied with possession will also, as against a stranger, maintain trespass — The same rule applies here as in trover, both bailor & bailee may maintain this action

5 Term 577.
Cro Lit 89.
4 Cro 84
2 Saund 47.

If the bailee delivers goods bailed to him to a stranger, the Bailor cannot maintain trespass against the stranger for the taking, tho' in some cases he may maintain trover — But if a stranger receives the goods from the owners servant who had the bare custody of them he is liable in this action to the master, it being an unlawful taking —

5 Ba 575, 576.

If property is given to one he may maintain trespass tho' there has been no actual delivery, for property draws after it possession in law — Yet a parol gift is not sufficient to entitle a donee to trespass, unless there has been an actual de-

5 Ba
Latch 214

livery, or something equivalent to an actual delivery — Suppose A seizes upon B's goods
5 Com 578 & takes them away - after they are taken away B.
2 Roll 557. sells them to C — Who must ~~bring~~ bring the action C or B? It was an invasion of B's property, therefore B & not C is entitled to this action

Trespass vi et armis must be brot against
5 Com 582. the tortious taker therefore if B takes A's goods and sells them to C, A cannot maintain trespass against C. —

Formerly many acts subjected a man to this action which would not at present subject him to any action — As where a mother entered another's house without leave to visit her sick daughter — 5 Com 584.

And it seems that any interference concerning another's goods not indispensably necessary subjected to this action — See Bac. title Trespass —

Comyns lays down a rule which would doubtless at present be deemed the correct one — that wher-
5 Com 582. ever a man interferes for the purpose of preserving another mans property — trespass does not lie —

Some have questioned Comyns Dig. as being no good authority — But it is laid down by L. Mansfield that Com. is a good authority. It is likewise
per Buller J. 3 Term. so laid down by other Judges ~~[illegible]~~ & Kenyon also is of the same
424. opinion. Coy has always been considered as a bad authority

he Exr has a right to the testators personal goods immediately on the death of the testator & this right draws after it a constructive possession. If then the goods of the testator is taken away before the Will is proved, the Exr may maintain trespass after proving the Will for he has by relation a constructive possession from the testators death, since his right is derived from the Will & not from the probate.

3 Bac 1 Term 480 — The same principle holds in favor of an Admr for taking the intestates goods before 5 Com 578. letters of Administration are taken out.

So a legatee of specific goods may maintain trespass for taking, after the Exr has assented, tho' before delivery to him by the Exr. 5 Bac 1 Term 480 But J Reeve supposes trespass would not lie if taken before his assent.

If there are two joint tenants or tenants in common of a chattel, both ought to join in this action against a stranger — but if one sue alone no advantage can be taken by the mistake, except by plea in abatement — But if one tenant bring trespass against the other, he may give in evidence under the general issue that he is co-tenant with the Deft.

Stra 321. Lit 323

1 Com 130
5 do 582
5 Bac.

For any invasion of property that amounts to felony, trespass does not lie in Eng. by reason of merger say the books —

1 Jones 148.
1 Com 1.
1 Mod 283.
Sta 870.
Buller
3 Term 176.
2 Roy 1672.

The Eng. authorities are contradictory as to the application of this principle. But doubtless forfeiture, & not merger is the true principle that governs in this case, therefore where felonies are not accompanied with loss of life & property, this action should not be taken away —

Dang 40.
Esp 392.
2 Wils 832.
3 Wils 309.
5 Com 579.
Dang 42

If a public officer by virtue of a legal process against one, takes the goods of another by mistake, he is liable to trespass — So if done by his Bailiff or under officers, for all will spring profes, the acts of his under officers, being his own acts —

A Sheriff is authorized to take bail, suppose good Bail is offered & he refuses to accept it — Will trespass ui et armis lie? It will not in Eng. tho, it will in Com. — Tho perhaps in Eng. an action on the case lies

3 Wils 343.
Cro 6. 196.

In declaring in trespass the goods must be described with convenient certainty — The terms "divers goods" or the Offts goods are not a sufficient description; nor is it curable by verdict, for under such description one recovery would not be a bar to another

3 Wils 292.
2 Roy 1410.
Sta 637.
5 Co 58
Esp 405.6.
4 Bur 2225.

action — therefore Judgment may be arrested
But this rule applies only, where the tak-
Esp 406. ing is founded on the taking or injury to the
goods themselves, but it is otherwise where
the taking or injury is laid only by way of
aggravation — in the latter case a description
like the above is sufficient —

So a general de-
Esp 406. Salk 643 scription is sufficient if made with a particular
1 Vent 117. reference to other things in the declaration —

In trespass for entering & breaking the
3 Leon 292. Plfts house & expelling him therefrom — the
1 Ld Ld 555. breaking & entering are the gist of the action
2 Wils 313. & the expulsion merely aggravation, therefore
3 do 20.
1 Vent 211. 217 a justification as to the breaking & entering
will cover the whole declaration — And if
the Plfff means to insist on the expulsion
as making the Deft. a trespasser ab initio
he must make a new assignment of it, as
a substantial trespass —

Trespasses of a perma-
3 Leon 212. 316. nent nature, as they are called in the books,
Esp 407, 8 may be laid with a continuando. but where
Salk 638. they are not of a permanent nature i.e. when
Bro Ab 239. each act of trespass terminates in itself, & being
Cro E. 282.
3 Leon 212 once committed cannot be repeated, there
can be no continuando — as killing a number

Salk 638. 639. of Laws — But these are to be declared as done at divers days & times between such and such a time — When a Pltff. sues for divers trespasses which do not lie in a continuando. Judgment will be arrested But when some of the acts ought to have been laid with a continuando, & others not, Judgment will not be arrested tho' all of them are so laid —

Esp 583. 506. Salk 640. 1 Lev 280 Croy. 46. The Pltff. must state in his declaration that he had possession, or property, & shew a right of possession. i.e either actual or constructive possession —

Esp 407. 1 Burr 2455 5 Com 347. The value of the property should be stated, tho' the omission of it may be cured by verdict —

1 Com 495 1. Carth 96. Hob 296. Hob. 138. 1 Bac 13. 4 Bac 48. 5 Bac 192 It is a good plea in abatement that a precedent suit is pending against the Deft. for the same trespass — 5 Co. 51.

But the pendency of a precedent suit against a stranger for the same cause is no plea —

Esp 307. 407. Salk 119. 642. Str 61. Hob 757. 2 Roy 132 It is said that for the purpose of aggravating damages the Pltff. may state in the declaration, facts which if taken by themselves would not support an action — But it is conceived that these facts are stated for the

Trover.

purpose of describing the manner in which the trespass was committed —

It is necessary

Esp. 319. for the Pltff. to state in his declaration a day
321. 407. certain, as that on which the trespass was
415. committed — But whether the day laid in
Bull. 17. the declaration is that on which the trespass
Dougl. 23. was actually committed, or not, is immate-
Cowp. 283. rial, for he may prove a trespass com-
Cro. El. 32. mitted on another day —
Hob. 104

If then the Deft.

Esp. 415. pleads a special plea, it must cover all
5 Bur. 406 the time which the declaration covers, i.e.
407. all the time within which the Pltff. may prove
1 Bulle. 38. the trespass to have been committed — Thus
if the Deft. pleads a release, he must traverse his guilt for all the time for which his release does not answer, i.e. all the time between the date of the release & the teste of the writ — If he plead title in himself acquired on a day certain, he must traverse his guilt as to all of the time antecedent to the day —

If a trespass be

5 Bur. 1922, 3
Sta. 420. committed by several the Pltff. may sue them jointly or severally, that is, he may declare against one, or more, or all, or

against all separately —

If on a Judgment against several one is compelled to pay the whole he cannot oblige the others to contribute —

Hard 164. 8 Term 186.

Tho' a trespass is committed by several, yet if it appear from the declaration that one is sued alone, & that another person — as J.S. was connected or concerned, the declaration is ill, & cannot be aided by verdict — 2ly. as to the principle on which this rule stands — for if the same fact appear otherwise than by the Pltf's declaration, he may still maintain his action — But it is also laid down in the same books, that if the other who was connected be unknown, the declaration is good —

5 Bac 1723. 1 Leon 41. Hob. 199. Sta 420.

A special justification as in all other actions for torts must be pleaded & cannot be given in evidence under the general issue — 2 Ray. 1372.

Esp. Sta 41. 610. Hob. 54. 60 Lit 282.

If one of three Deft's pleads a special justification which is found for him & which shews that the Pltf. had no cause of action against any of them, he cannot have Judgment against the others, even tho the issue as to them be found for the Pltf. or tho' they have

Esp. Sta 610. Hob 34. 2 Ray 1372

suffered a default — But if it does not appear from the justification pleaded, by one of the three, in the last case, that the others are necessarily innocent, judgment may be given against them.

Esp — 5 Bac 191. Salk 636. Cro C 407. Cro J. 445. 5 Co 6. 536.

At Com. Law in all actions with force, it was necessary to state in the declaration, that the wrong was committed vi et armis, they being words of substance, as the omission of them would alter the judgment from a capiatur to a miseric[illegible]cordia —

5 Bac 191. Salk 636. 2 Roy 986.

But since the Stat. 5th Wm & Mary, it has been holden that they are words of form only — For they seem to be still necessary to carry into effect the provisions of the Stat. one of which is, that the Deft. in every action, in which a capiatur pro fine would issue at Com. Law, shall on signing judgment pay a certain sum as a substitute for the fine due to the ~~Cro~~ Crown —

Esp 5 Bac 192. Cro J. 446. 426.

So "contra pacem" are words of substance Cauth 66. Salk 636. But an omission of either of the above phrases is now cured by verdict by virtue of the Stat. 16 & 17 Car 2 & shall be amended —

Salk 640.

At Com. Law a joinder of trespass & trespass on the case in one declaration would be ill; be-

8 Co 39.

cause different Judgments would be necessary —

The Capiatur pro fine is now taken away
1 Wils 321, or 2. by Stat. 6th Wm & Mary; yet the general criterion has been the difference or sameness of the Judgment.

Trespass on the Case for misfeasance (if not vi et armis) & negligence & trover may be laid in the same declaration —
2 Wils 319. 321, 2.
But Trespass vi et armis & trespass on the Case cannot be joined; therefore trespass vi et armis & trover cannot —
1 Term 274.

Justice Buller says that the identity or difference of the Judgments is not a universal criterion — But he asserts that when the same plea, that is, the same General Issue is proper, & the Judgment would be the same, the cause of action may be unnecessarily joined
1 Term 274.
4 do 557.
5 Bur 191.

By the same Judgment is meant the same Judgment at Com. Law before the Stat. 5th Wm & Mary —

Contract & tort cannot be joined in the same declaration, & if they are, the fault will not be cured by verdict. —
4 Bur 11.
1 Term 176.
Bro C. 20.

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Action of Trespass on the Case arising ex delicto.

This action considered as it affects the person & personal property includes three classes of cases—

3 Bl 122. 1st Wrongs not accompanied with force, but injurious, as vexatious Law suits, malicious prosecutions, slander &c

2. For consequential injuries occasioned by acts which are accompanied with force — as injuries done to a servant — per quod servitium amisit —

3 Bl 123. 209. 2 Term 167.

3. Where the injury has been occasioned by the neglect or culpable omission of any duty incumbent on the person to perform, as if one retain an Attorney to conduct his suit & in consequence of any neglect the party suffers a loss —

3 Bl. 123 153, 4 208, 9. 2 Roy 1399. 1 Term 167. Esp 598. Finch L 188.

This action as well as all actions on the case are generally considered as founded on the Equity of the Stat. of Westm. 2d 13th 1st It was however known in one or two instances at Com. Law — Previous to this time the only formed actions founded on contract were debt, covenant, & account — Those on tort were trespass, Replevin, Detinue, & deceit —

3 Re. His. Eng. L. 89. 243 3 Bl. 123 Lath 20

The action on the case therefore is scarcely known at Com Law. It would lies however in two or three cases — as in

the case of an escape, when it would lie in favor of the Sheriff —

In Com a distinction has obtained between an action of Trespass on the case of an action on the case — the former of which it is holden is founded on tort, the latter on contract — but this distinction is an arbitrary one, not warranted by the Eng Law —

3 Bl 208
Reeve 245.
394.

But between trespass vi et armis & trespass sur Case, there is a material difference

There exists at the present day strong reasons in Eng. why the line of distinctions between these two actions should be strictly adhered to. And altho' all these reasons do not at present exists in Com. — yet Mr. G. thinks it highly important that it should be strictly regarded here —

~~vi et armis~~ When the action of trespass vi et armis was brot in Eng. the Pltf. if he failed was compelled to pay a fine to the public, that is, the King —

But when trespass on the case was brot, there there was no fine for the King — but merely an amercement pro falso clamore, which in case the Deft. prevailed went to the Deft. And altho' both these species

Dyer f. 125.
Mod 31
Cro 6. 124.
196.
Ba 196.
7 Ba 11.
2 Ba 506.

of fine & amercement are in fact disused, yet the Judgment still continues the same with them, & unless the form be adhered to Judgment will even be ~~adhered~~ arrested in Eng.—

Within a few years past however a Stat. has been enacted abolishing in a degree the distinction between Judgments, when formerly there must have been a Capiatur pro fine, or an amercement.

But however this Stat. may affect the form of the action, it may not be material as to this question, for wherever these actions prevail, the rules obtain — Viz. — that action on the case, principles of equity rule as to the recovery or quantum of damages — whereas in trespass vi et armis — great strictness and technical nicety are thought essential to be adhered to —

And again, it is necessary to keep up the distinction an account of the great confusion which would inevitably result from their being confounded.

It is material therefore to mark the time of distinction between trespass vi et armis & trespass on the case. —

All injuries accompanied with force & which are immediately injurious to the Pft. are the subject of trespass vi et armis. —

But altho' the original act producing the

injury was ~~immediately~~ accompanied with force, still trespass on the ~~case~~ case may be brought in many cases; the converse of the former rule being true ~~that~~, viz that when the injury produced by the forcible act be merely consequential, & not the immediate effect of the force, trespass on the case will lie — As if J.S. had thrown
3 Bl. 308, 9. a log into the street, if the log while still influen-
Sem 487. ced by the throw hit J.N. the action will be
2 Bl R 892. trespass vi et armis for the injury is the immediate
2 Burr 231. consequence of the force — But if after the
Sta 634. log was at rest in the street, J.N. should
2 Bl R. 6. 1055. fall over it & hurt his shin, if he would sue
2 Burr 648 J.S. for having put the log there, he must
6 D. 125. bring trespass on case for the reasons above given

By this rule all the cases are governed. It is however extremely difficult, by its nicety always to draw the line of distinction —

The instance of a man's suing one who beat his servant whereby he lost the use of his service is a good case to exemplify the rule — The act was committed with force
6 Ms J 440 It was directly & immediately prejudicial to the
Esp 638. Sta 634. servant, & therefore he shall have trespass vi et
1 Com 467. armis. — But to the Master it is only consequential. Viz the eventual loss of service

But what

5 Bac. 191
5 Co. 11.
Croke 141.
1 Ro. 86.
6 Geo. 124
2 Mod. 31.
131

is the meaning of the term immediately injurious, — for if this distinction be not understood of the wrong action be lost, the declaration is bad on error, or the Judgment will be arrested — —

In the solution of this question it may be observed that it is not necessary that the injury be instantaneous effect of the force — However when the injury is the instantaneous effect of the force it may be safely said that trespass vi et armis is the proper action —

But tho the injury be not the instantaneous effect of the original force used still this may be the proper action — for if the effect be produced by a concatenation of events & causes, in such a manner as that the original force may be said to be continued, the whole chain may be said to constitute but one act — As if J.S. throw a foot ball which by bounding & rebounding eventually breaks my window J.S. shall be liable to me in trespass vi et armis — for it is perhaps but the continuance & present operation of the original force used in throwing the ball, without the intervention of any other rational cause or agent to produce the effect — nor does the original force or impetus cease until the injury is produced

But if in the above example some other rational agent had given the ball a new direction, or a new impetus, the Trespass vi et armis would not lie, but if any action would lie Trespass on the case is the proper one.

Bro J 446.
Bro E 10.
Esp 599.
1 Com. 204.
2 Bl Rep 399.

But the person giving the first impetus is still liable in Trespass vi et armis, altho some person does give it another direction to the instrument of destruction, if the person did not do it voluntarily, if the original force will be supposed still to be in operation — as in the celebrated squib Case —

When the Deft. threw a squib upon the stall of a meat seller in the market — in this case in order to preserve himself, the vendor pushed it off on to another stall of the owner of this on to another, & so on until in the event it went off & put out the eye of the Pltf. — the Deft. who had first put the squib in motion was sued in Trespass vi et armis, & it was holden that it would lie —

2 W Bl 994.

Whenever therefore an instrument of mischief is put in motion the person doing it will be liable so long as its original force continues, unless some rational agent gives the instrument a new direction — & in this case the agent must have aided voluntarily, & without being compelled by his own particular situation — when therefore a

squib was thrown among a crowd, each person was actuated by necessity to keep it from himself, it therefore could not be considered as a voluntary agent — it may be compared to the case of the bounding of the foot ball —

So also it is good law, that if one let loose a mad ox, he shall be liable in trespass vi et armis for the injuries which he may do, for it is like setting in motion an instrument of mischief: & on this ground the case may be distinguished from that of digging a ditch whereby another's land was overflowed, or that of erecting a shout, for in these cases trespass on the case is the only action —

2 Wils. 174. Str. 638. 9. Esp. 638

Where a man rode into Lincolns Inn fields, & his horse ran away from him & did injury, the action of trespass on the case was lost, & a recovery had because, the act of taking the horse there was unlawful; but trespass vi et armis would not in that case lie, because the act of the horse going into the crowd was not a wanton or voluntary act in the rider, but one which he could not control — yet Ch. J.

1 Mont. 295. 2 Sev. 72.

Dr. Gray speaking of this case, supposes it to be trespass vi et armis, & said it was hesitatingly decided. The action lost was certainly tres-

pass on the case, & as such was properly decided.

But when the person is literally the agent, it matters not in fact whether the act really concurs with his will, or not, if the act be attended with force; this being for the purpose of an action against the master.

When however the person is agent only by implication of Law, the will must concur as in the case of a master, who expressly commands his servant or animal to do the forcible act which produces the injury — Here trespass vi et armis lies against the master, for his will expressly concurs with the act.

But if a servant does an act by force & followed by injury; but without an express command, the master is not liable in trespass vi et armis. But as every man is obliged to have none but discreet servants, he shall for this act be liable in trespass on the case; & as he did not expressly command his servant to do the very act, tho' by implication of Law his servant is his agent but this implied agency will not subject him.

6 Dwn. 195. 2 Ld Raym 542 & 442. Salk 44.

When therefore a servant being in the pursuit of his master's business, without an express command, does a forcible or unwarrantable act, whereby an immediate injury results to the Pltf. Tres-

pass vi et armis will lie against the servant, or trespass on the case against the master — for as
Dunf. 279. the master should not have employed so neg-
Str. 1083. ligent a servant — if the same may be said
4 Burr 2078 of a dog which is prone to ~~bite~~ do mischief, trespass on the case will lie against the owner for letting him run, if a special damage or injury result (& if under particular circumstances trespass vi et armis would lie also — as if he had notice that he was used to bite people, & notwithstanding he let him run, for the thing would be done willfully & equivalent to a command —)
+ Deere —

If A wilfully steer his vessel against B's & an injury result A
8 Jam 188. is liable in trespass vi et armis —

But if A do not take proper care & drive negligently against B's carriage &c. he is liable in trespass on the case only; for in the latter case he neither does the injury by striking with his
8 Dunf. 188. own hand, nor voluntarily or wilfully directing it to be done, as in the case of purposely steering his vessel against B's, but merely by a criminal negligence suffers the act to be done, & therefore shall be liable in trespass on the case. — The distinction does not turn upon
3 East. 593. the acts being done wilfully, or negligently, but the injury's immediate or consequential only

Of the Cases in which Trespass on the Case will lie

It is not meant here to enumerate all the particular cases in which actions on the case would lie - this indeed would be impossible - It is only meant to mention such classes of cases wherein there is an injury to the person or to the personal property which are not to be found under the titles ---

The action will lie in cases of a criminal neglect, on the ground of delictum - But

2 Ray. 917. 1 Raw. 252. in these cases the ~~duty~~ neglect must be of a duty imposed by law, - not of one which is founded in contract merely - Thus the law imposes upon the finder of goods an obligation to keep with care & ordinary diligence, but if he do not wherely the goods are lost or injured this action will lie.

Cro E. Com. Contra - 219. but as to the illegality of this decision Deere....

1 Com. 206, 7. 1 Rol. 95. 2. 2 Ba. 366. Salk. 325. So any officer in the law is liable in all cases where damage has ensued from a criminal neglect of his duty as an officer. Thus a sheriff is liable to the Pltff of a debt if he neglect to return a writ.

Attempts have been made to draw a distinction between the case of a Sheriff employing a deputy & other cases. But it has been decided

Long 42. that Sheriffs like other principals or masters are liable civiliter for the acts of his servant the Deputy.

Indeed the rule is almost universal that any one who undertakes to do business for another in the line of his profession, may render himself liable to this action —

But if the business undertaken be not of the profession of the Deft. he shall not be liable for want of skill merely unless there be an express agreement to do the work well — But for negligence the Deft. shall in all cases be liable —

2 Roy. 214.
2 Wils. 359.
Esp. D. 601.

In the profession of physic or surgery, a ~~professor~~ practitioner, shall not be liable even for negligence, provided physic or surgery (as the case may be) be not his professional business — or if he does not expressly agree that he will perform without negligence. — This rule is founded rather in policy than reason. —

3 Bl. 122.
166.
Esp. D. 601.
Com. 165.

And in general this action lies against any one by whose act the health of the Pltff. is injured as against a seller of bad wine — But query how upon principle can a seller of bad wine be liable unless he knows the wine to be bad, but such is the law — Blackstone says he is liable because there is always an implied contract or warranty that provisions sold, are good —

This action of warranty is treated as arising ex delicto — but it arises as would seem to arise

Com. 166.
170.
9 Co. 52.

Trespass on the Case.

1 Rol. 90. 15 in this as in some other cases ex contractu —
3 Bl. 166.

This rule as Lain down by Blac. seems to be founded in reason, but it is not to be met with in terms in any other Eng. books —

But in every other case except in the implied warranty of ownership when one sells a thing the maxim Caveat Emptor applies — the exceptions which obtain in the case of the sale of provisions for in these cases a neglect cannot well be imputed to the vendee. —

Esp. D. 606.
Cro. J. 350.
1 Com. D. 208.
Salk. 662.
3 Bl. 12.
2 Ray. 109

This action of trespass on the case lies also where the owners animal being addicted to bite & other injuries of the like sort does an injury to another — But in this case there must have been sufficient notice given to the owner that his animal was addicted to to such kind of injuries as that need for — But if the owner have notice of the species of injury done it is sufficient. —

It is laid down in the Books that a scienter, is not traversable — The rule thus Lain down is apt to mislead; it means merely that the scienter cannot be traversed by plea for there can be no issue formed upon the word "knowing". But he may plead not guilty therefore he may deny the fact of scienter.

1 Com. D. 8.
Sho. 18.

Esp 602. Where the animals are *feræ naturæ*, the owner
2 Roll. 566 is liable for any mischief they do, tho' without no-
1 Com 208. tice.
6 Co 54

This action lies for a disturbance. By dis-
Esp 639. turbance is meant interruption of the free en-
Co 6. 84. joyment of one's right, it may be of a corpore-
466. al or incorporeal right. — As diverting a water-
9 Co. 112.
1 Vent 295.
1 Vent 186.
Sta 5. 638. course. —

This action lies against a Sheriff for the escape of a prisoner arrested on mesne or
2 Ba 245 final process. It must at Com. Law have been
2 Burr 126 a special action on the case tho' not called by
2 W Bl 1148a
2 Sta 873. this appellation. — The Stat. Westm. 2d first
Co 6. 17. Rich 2d gave an action of debt against the
1 Sho. 76. Sheriff where the prisoner was arrested on final process —

This action being founded on a mere fault is not within the Stat. of limitations which speaks
2 Ba 245. of debts arising by contract —

A distinction is to be
Esp 608. observed between a process which is void & one
2 Wil 313. which is erroneous — for when the process is void
2 Mod. 31.
Salk 273. no action will lie against the Sheriff for an es-
8 Co. 146.
Co 6. 141. cape; — but it will where the process has been erro-
196.
Co 8. 188. neous or irregular only

This action lies against rescuers
Bulle 62. of persons taken under mesne or final process. 1st As

to mesne process - here the action lies in favor
Cro E. 77. of the original Pltf. in the suit - Hob. 180 says
Jenk 311. that Trespass vi et armis may be maintained,
but this is not true. -

2 As to final process -
Esp 610 here the action may be brot by the original
5 Com 438. Pltf. or the Sheriff -
3 Bull. 200

This action lies in favor of
Esp 613 the Sheriff against a prisoner escaping under
Cro E. 53. mesne or final process -

So where an under Sheriff
permits an Escape, he is liable to his principal
in this action - But an under Sheriff cannot
maintain this action against the Escaper, even
tho' his principal should have recovered
against him; because he is not liable to his
principal by Law; but upon contract with
him merely. And the under Sheriff is not lia-
ble to the Sheriff Pltf. unless in the case of
voluntary escapes; if in this case he might
maintain an action against the party escaping,
were it not for the rule of Law, that no ac-
tion can be maintained by the Sheriff for
an Escape which was voluntary

In Com. Mk. G. Justices that an under
Sheriff can maintain an action for a negligent
escape, for he is liable to the Pltf.

Esp 617. Attorneys are liable to this action for any neglect or misconduct to the injury of their Clients —
2 Wils 325 It has never been supposed that an Atty
Salk 86. was liable for any loss to his client thro'
4 Burr 2060. ignorance as those of other professions are for
Esp 618. 3 Wils 37 perhaps the reason is the glorious uncertainty
Hett. 125 of the Law. —

Attorneys may subject themselves to an action by the adverse party, if guilty of any fraudulent or dishonest practices —

This action lies against
1 Leon 328 Justices of the Peace for refusing to do their
Esp 618 duty — as refusing to sign a writ. —

So it will lie against
1 Hawk 90. a Town Clerk for refusing to record a deed,
1 Cab & P 96. grant Copies of record &c.

And in fact the gen-
1 Hawk 90. eral rule may be laid down, that it applies in
1 Hales P.C. all cases where an officer refuses to do his duty
97. to the injury of an other person. —

This action lies for
Esp 618. breach of trust by Bailee in all cases where the
3 Keb 909. property is injured for the want of that Care
Salk 26. which the Law requires — Here the action is not
6 Co Lit 89. 4 Co 83. considered as arising ex contractu, but ex delicto —

5 Term 657. It lies in favor of freighters of goods either

Esp 623 against the master or owners of a vessel for
2 Salk 440. goods lost or injured thro their negligence.

It was formerly holden that where the
Esp 623. action is brot against the owners, they should
all be joined, for it is quasi ex contractu as
5 Term 657. to all; but now it is held that the action need
not be brot against all.

It is clearly established
that if the cause of action arises ex contractu the
Pltff must sue all the contracting parties, but
5 Term 657. where it arises ex delicto, the Pltff may sue all
Cath 294. 171. or any of the parties, upon each of whom indi-
vidually a Trespass attaches.

Post masters are not
Esp 624 liable for money or letters lost thro the fault of
Comp 754. Salk 17. their sub agents.

But every Post master of their
3 Wils 443. deputies are liable for their own fault or neg-
Comp 765. ligence.

In this action Inn Keepers are liable
Esp 626 for all losses of property in their custody, when
Bull 73. Jones 85. the loss arises from that want of Care which
8 Co 72. the Law requires of them. Salk 178.

This action
lies agst ~~one~~ an Inn Keeper for not receiving one
2 Show 327. one who offers himself as a guest, unless he has
sufficient reason for refusing him, as that his

3 Bl. 166. 9 Co. 87. house is full or sickness in his family —

So it lies agst a Common Carrier, as to which see Esp 619. Bulle 70 2 D Ray 909. Salk. 143. Co. Lit 89. 1 Stra. 128 — 1 Sum 27. 33. 1 Wils 281. 2 Stra 690. 11 Bl. 298. 4 Burr 2298. —

It also lies for deceit in the sale of property either by false affirmation or false warranty — as if a seller knowing the value of goods affirms them to be different from what they really are

Esp 629. Salk 211. D Ray 1118. 1 Burr 1667. Co. J. 4.

But if the buyer has it in his power to inform himself of the value, but neglects to do it, the action will not lie, tho there has been a false affirmation or false warranty — this rule relates to a general warranty, as to which the true rule is, "That a general warranty will not extend to defects that are obviously the object of one's senses."

2 D Ray 1118. 1 Saund. 116. Finch L. 289. 3 Bl. 167.

So this action lies for a purchaser against a seller for artfully disguising some secret defects —

Esp 632. 9 Rodd 5.

So it lies against one who sells goods knowing them not to be his own; here it is necessary for the Plff to prove that the Deft knew the goods not to be his own, in order to support an action on the ground of fraud. —

Esp 632.

Tho. the deft is liable if he has not science but not on the ground of fraud

3 Bl. 166. D Ray. 593. Cart. 90.

Salk 210. but on an implied warranty, that the deft. has the
Cro J 474. title. — 1 Saund. 109. 375. —
1 Show 63.
68.

So also it lies for an injury occasioned by any false affirmation by which
Esp 632. another is defrauded, tho' made by one who
3 Term 5. has no interest in the fraud Butler 30 —
1 Com. 167.

So also it lies for any injuries occasioned by false preten-
Esp 688. ces, or by cheating; as with false dice. or by preson-
Bull 32. ating another, & by that means receiving money
Cro E. 90. of another & giving a discharge. —

It is generally true says M. G. that special damages must be ~~stated~~ shewn to an action on the case, but the rule has many exceptions — as in slander —

~~agt. the presiding officer~~ This action lies
agt. the presiding officer of an election, if he re-
Esp 647 refuses to receive a vote tendered by a legal voter.
Salk 19
3 Mod 17. So also the candidate may have an action for
2 Vent refusing to receive the vote, for two persons rights
25.
2 Lev 50 are injured. — 1 Vent 206. 2 Keb. 26. 32.

So an action may be maintained by the
11 Co 99. Candidate against the returning officer, if he
Esp 647. makes a false return of the votes to the prejudice
of the Candidate —

It may also be brot. for making
3 Bl 11. a false return of a mandamus 2 Sho 1085 —
Salk 441

Trespass on the Case.

It lies at Com. Law, by an Author agst. any
4 Com. 2303 who publishes his works.

It is a general rule
2 Roll. 739 that any person employing another as his servant,
Salk. 441. is liable in an action of Trespass on the case,
2 Tho. 1883 for any acts of such servant, whereby another is injured (Gould doubts the correctness of the of the general rule).

If an officer is prevented
~~Cro J. 908.~~ by a 3d person from serving legal process, an
Cro E. 908 action lies in favor of the officer, or the Plff.
5 Co. 93 against such 3d person.

In a declaration in
Gilb. 193. trespass on the case, no precise form of words is
1 Com. 541. necessary, as in the case of most actions at Com. Law.

The pleadings in this action are mostly the same as those in trespass vi et armis — & where they differ will be noticed under "Pleas & Pleadings".

Writ of Mandamus.—

1 Ven. 175 — This is a prerogative writ issuing from the Court of
3 Bu 540. King's bench in Eng., answering in some degree to
3 Bl. 110.
Salk. 429. a specific relief afforded in Chancery.—

It is not issued to recover damages, but to restore the party injured to his right.—

3 Bu 527. It lies in cases only which relate to government
4 Mod. 281.
3 Bur 1267. or the public, without which there would be a failure of justice.—

The object of it is to restore or admit a
11 Co 93. person to some franchise which concerns the public of which he is deprived.—

It never issues against an individual, as an individual, but against a pub-
3 Bu 528. lic officer, body corporate, or some inferior Court, com-
4 Mod 52. manding a performance of their corporate, or official duty.—

The Town and parish corporations in Con.t may be subject to this writ.—

It is demandable of common right by the individual when he has a right
5 Bu 528. to it— If the Court has not the power to impose terms— as Chan. has—.

This writ lies to compel the proper officer of a corporation to call a meeting of the

Sta 1003. Corporation where they are obliged by Law to do it.
The Ray 431. If refuse.
1 Sid. 14.

It also lies to admit or restore a
1 Vent. 77. person to the enjoyment of a Corporate office,
4 Burr 1999. when he has been duly elected.
Esp. 76.

This writ will issue
Cath 457. to compel persons in authority to do their duty.
Sta 113. As if a Justice of the peace in Const. should refuse
Salk 552. to render judgment, the S. C. on application by
Salk 299. the party injured will issue a Mandamus.
3 Bac.

It will issue against a Clerk of a Corpora-
2 Sta 799. tion, commanding him to deliver over the books & papers
Esp. 663. of the office to his Successor.

As to what offices
1 Ba. 94.
2 Bulst. 122 concern the public administration of Justice, no
1 Vent. 143. precise rule is laid down in the Books. Mr J.
150.
The Ray 211. supposes they are such as are officers of the Law
1 Sid. 112.
Salk. 175.

It will issue agst. an inferior Ct.
who refuses a person having a legal right, to practice
1 Vent. 11.
1 Ch. 459. as an attorney, commanding them to admit him to
1 Sw. 75. practice.

The office must be of a certain permanent
nature. Therefore an office who is appointed under
1 Term. an institution by voluntary subscription & not incor-
porated or endowed by Law, is not an officer subject
to this writ. As the Clerk of a circulating library.
By the permanency of the office is not meant that

1 Sum it should be a freehold franchise, but that the office is one who is appointed by law — as annually, semi annually &c. —

In Cont. the S.C. will issue this writ to command a County Treasurer to pay money to one who is intitled to it where the Treasurer refuses so to do. — As in the case of a County creditor. — So also against the Justices of the Peace in the County commanding them to levy a tax for the purpose of building a Goal, where it is their duty & they refuse — So against the Select men of a Town commanding them to support the poor of a Their Town. —

Where the office is of a private nature
Esp 666. this writ can never be issued to compel the performance of official duty — As in Eng. it will not lie
Sid. 46. against the Steward of a Court Baron. —
1 Vent. 143.

This writ will never lie to compel the
1 Wils 266. performance of an act by a magistrate or officer, where it is doubtful whether he has a right to
Esp 665. do the act. —

Neither will it issue where there is
Doug. 526. any other specific legal remedy by which the person complaining may obtain redress. As where
Esp 666. an application was made for a mandamus to compel a transfer of Stock, the Court refused it because the party had a remedy by action on the Case,

if they refused. No (says Mr. G) will it issue where the party has a remedy in Chancery —

It can never issue against a Ct. or officer to compel them to perform an act, where the performance of it is discretionary with the Ct. or officer. —

2 Str 881.
2 BR. 708.

If several are deprived of a franchise or office, they must have separate writs; as the causes of their deprivation may be different. —

Salk 443.
Buller 266.

As to the mode of granting this Writ. —

It is not usually granted on the first motion, tho' it some times is. The usual mode is for the Ct. to make a rule directing the party complained of to appear in Ct. & shew reasons why a writ of mandamus should not issue. The first motion of the party applying must be supported by affidavit. —

3 Bl. 111
Esp. 669
3 Bur 528
Buller 199.
200.

Under special circumstances it may be issued in the first instance, on the first motion, as where an immediate interposition is necessary. For where a motion was made for a mandamus agst. the Justices to compel them to support the poor, the Ct. issued it in the first instance lest the poor might starve if a rule was granted to shew cause — here the Ct. were

Esp. 669.
Stage 168.

satisfied by the proof.

But the writ never issues there has actually been a default in him
Esp 670. against whom it issues; as it is not a preventive remedy.
Bulle. 199

This writ must be directed to
Salk 433. 436 the person whose duty it is to perform the act
Esp 672. complained of; for it cannot be directed to one person to command another to do the act.

Where the act ought to be performed by some
Esp 673 part of an aggregate corporation, the writ must
Salk 699. be directed either agst. the whole corporation
701. 1 Tho 553 or against that particular part.

Where sufficient cause on the return of the first writ is not shewn, the writ itself issues; this writ in the first instance
3 Bl 111. is not usually peremptory, but requiring the act to be done, or shew some reason why he ought not to do it.

If the deft. in the writ returns sufficient cause
1 Cut. 111 for not doing the act, he is exempted; altho' the reasons
Salk 432. are false in fact; for at Com. Law the return of the
Esp 682. person on the writ is not traversable. but an action on the case did then (and does now) lie against the party making such false return.

But now by
2 Roy. 481. Stat. 9 Anno. the return may be traversed; therefore

3 Bac 543 fore if he makes a false return, false in fact, it may be traversed. —

Since this Stat. the Jury may try the truth of the return, if the issue being found false, the peremptory mandamus will immediately issue — therefore there are now two remedies for making a false return — The only remedy at Com. Law for a false return being by action on the case. —

If a false return is made by several,

11 Co 99 an action will lie against all, or one, or any

Carth. 1762 of them. —

If any one of several Justices or select

3 Bac 544. men are sued for a false return, if that one op-

D Roy 564. posed to a false return but was overruled by a

Carth. 172. majority, he will be excused. —

Where the return on

Bulle. 201 the rule to shew cause is insufficient on the face of

Esp 685. it, a peremptory mandamus issues of course —

3 Bl. 111.

If on Trial of the action on the case Judgt. is rendered in favor of the Pltf. that the return is false,

Salk 430. a peremptory mandamus issues of course. But

3 Bac 544. this rule will not hold unless the action on the case, and the application for a mandamus are both in the same Court. —

If no return is made

Mandamus.-

Salk 429. 3 Bl. 110. Stra 808. Bro C. 146. 4 Bl. 287.

on the peremptory mandamus, an attachment issues - A refusal to return being punished as a contempt.—

But an attachment never issues till after a peremptory rule for him to return the writ.—

The attachment must go against all the Defts. in the writ of mandamus, altho' some of them were in favor of making a return / Mr. de Hon. Ride sup.

The Supreme Court of the U. States have decided that they could not issue a mandamus, being restrained by the Constitution, which gives them appellate jurisdiction only, except in a few particular instances.—

I know of but one instance where this writ has been issued in Connecticut. That was agst the Town Clerk of Litchfield, commanding him to record a deed which he had refused to do— And on the return of the writ the Court adopted the Statute of 9th Ann. as the rule of the proceeding in trying the sufficiency of the return.—

Writ of Prohibition.

3 Bl. 112. This is a prerogative writ issuing generally from
4 Bac. 240 the Ct. of Kings bench in Eng. to prevent in-
12 Co. 6. ferior Courts from exceeding the limits of
4 Com. 287 their jurisdiction

1 P. W. 476. ~~from any~~ This writ may however issue
Hob. 15. from any Court of Westminster Hall. 12 Co. 58.
Palm. 523.
1 H. B. 476. It is directed to the inferior Court
of the ~~party~~ proceeding commanding them
to cease from the prosecution of the ~~suit~~ suit
3 Bl. 112. It is always founded upon a suggestion
that either the cause originally, or some col
lateral matter arising therein does not be-
long to that jurisdiction, but to the cogni-
zance of some other Court.

The mode of
3 P. W. 476. obtaining it is similar to that of obtain-
Salk. 549. ing a mandamus, being a rule on the
Holt 593. Ct. below to shew cause why the writ
Hob. 79. should not issue, the motion is supported
2 Ray. 1112. by the affidavit of the party applying,
that the ~~matter~~ cause is not within the in
ferior Ct. jurisdiction

It is a question whether
Hob. 67. the party is entitled to it as a matter of right, or
Sho. Ray
3, 4.

Prohibition.

1 Sid 65. whether it is discretionary with the Court to grant
Salk 33. or refuse it. The better opinion seems to be
2 Ra 220. that the Court may at their discretion grant or
5 T.R. 586. refuse it. —

The object of the writ, it is said, is to pre-
2 H Bl 100. vent the inferior Court from exceeding their jurisdic-
tion; but this is not always the case. For where a Stat.
has prescribed a particular mode of proceeding
if the Court does not follow the mode thus pointed
out this writ will issue, because they attempt to take
cognizance of a cause in a way contrary to the Stat.
This then & want of jurisdiction are the only cau-
ses in which this writ will issue. —

If the cause sug-
3 Bl. 114 gested appears to the Court to be sufficient, the
writ of prohibition immediately issues, com-
manding the ~~Tribunal~~ Court not to holde plea & the party
not to prosecute. —

But sometimes the sufficiency of
the cause suggested is doubtful with the Court, in
such case the party is to declare in prohibition.
To declare in prohibition is for the party to prosecute
Cro E. 736. a civil action, by filing a declaration against the
8 N. B. 44. other, upon a suggestion or fiction (which is not traver-
1 Lev. 125. sable), that he has prosecuted in the Court below
4 Mod 151. notwithstanding the writ of prohibition. And if upon
3 Bl. 114. the pleading in this fictitious action, the Court judge

the suggestion to be sufficient ground of prohibition in point of law, then judgment with nominal damages shall be given for the party complaining, & the Pltf. prosecuting in the inferior Court, & also the Court shall be prohibited from any further proceedings — But on the other hand, if the Superior Court shall adjudge the suggestion to be insufficient, then Judgment shall be given against him who made the suggestion, & a writ of consultation shall be awarded; so called because after deliberation of consultation, the Judges find the suggestion to be ill founded, & this writ of consultation returns the cause to the original jurisdiction (the inferior Ct.) to be there determined. —

Sometimes there is a writ of

3 Bl. 114. ~~prohibition issued where there~~ consultation granted when the writ of prohibition has actually been issued. For if the ground for granting the prohibition be proper in point of law, yet if the fact that gave rise to it, be afterwards falsified a writ of consultation will be granted remanding the cause to the inferior Court. —

In some cases the Court itself on it's own mere motion will award a writ of consultation — as if they have issued a writ of prohibition, & they should upon further consideration be of

3 Bl. 114. opinion, that it ought not to have gone, they may by writ of consultation stop the prohibition.

Disobedience to the writ of prohibition is a con-
4 Bac. 262. tempt, & the Court will punish it as such, with
F. N. B. 40. fine imprisonment, or pillory, at their discretion. –
4 Bl. 287.

The commencement of a new suit for the same
Mod. 599. thing in the same Court after a prohibition is issued
1 Lev. 111. is also a contempt which the Court will punish. –

The process by which the party is punished
1 Vent. 348. is by an attachment, as in the case of mandamus.
4 Bac. 262.
3 Lev. 360.
Cro. C. 559.
Cro. 403.

The State of Connecticut have a Statute empowering the Chief Judge of the Superior Court or any two of the other Judges thereof to issue the
Statutes 347, 8. writ of prohibition in vacation. If it is term-time application must be made to the ~~whole~~ Court themselves. – This writ whether issued by the whole Court, the Chief Justice, or any two of the others, must be sealed with the Seal of the Court. The 2d. para-
Stat. C. 348. graph of the Statute adopts the Com. Law, or Stat. Law as the mode of proceeding on the writ. –

Of Writs of Habeas Corpus.

3 Bl. 129 &c. This is a writ by which a person restrained of his
Vaugh. 136. liberty may be brot before a Supr. Court for a special
3 Bac. 1. purpose, either at the suit of the person restrained, or at the suit of some other person, who has a right to have him in court — Of this writ there are various kinds. —

3 Bl. 129. 1st. Habeas Corpus ad respondendum. This lies
Dy. 197.a where one has a cause of action against one confined
249.c by the process of an inferior Court; & the object of it is to
2 Bac. 2. remove him to charge him with this new action in
2 Mod. 198. the Court above. —

2d. Habeas Corpus ad satisfaciendum. This lies
3 Bl. 129. where Judgment has been rendered against one confined in prison; & the Deft wishes to bring him up to some superior Court, to charge him with process of Exn. —

3 Bl. 130. 3d. Habeas Corpus ad faciendum et recipiendum.
3 Bac. 2. 15. This lies where the Deft is confined by the process
1 Mod. 285. of an inferior Court, & wishes to remove the action to
2 do. 198. a Superior Court to be there decided. —

This kind of
Salk. 352. Habeas Corpus is demandable of common right on
3 Bl. 130. application of the party; & it instantly supersedes all
2 Mod. 306. proceedings in the Court below. It differs from the
3 Bac. 15. former two, in this, that those are at the suit of
12 Mod. 166.

some third person, this, at the suit of the person confined.—

Altho' the writ is demandable of common right, yet it is said it will not be issued, when the effects of it will abate a rightful suit already commenced.— This is not correct for the Supreme Court issue the writ, tho' when they are informed of the suit commenced, they will remand it by a writ of procedendo.— Neither of these three writs are used in Connecticut.—

4th. Habeas Corpus ad testificandum.— This is
3 Phil. 51. in use in Con.t as well as in Eng. It is proved out
3 Bac. 3. by a Suitor in some Court, who wishes for the testimony
Com. 17. of a person confined in Gaol; if this writ removes him to such Court to testify.— As soon as he has testified he is immediately remanded back to his place of Confinement.—

If he refuses to testify, he may be punished for contempt, either by fine or corporal punishment.—

It has been questioned whether if a prisoner gets away from the officer on this writ, it is an Escape? If the Officer attends him in a circuitous or careless manner if he gets away, it is an Escape, otherwise not.

There are many other writs of Habeas Corpus of little
3 Bac. 2, 3. consequence.— But the great & efficacious writ in all manner of illegal confinement, is

5th That of Habeas Corpus ad subjiciendum.—

This is directed to a person holding another in custody, commanding him to produce the body of the prisoner, with the day & cause of his taption & detention, & to do submit, & receive whatsoever the Court or Judge awarding such writ shall direct.—

8 Lem. 314. A person imprisoned by either house of Parliament for contempt of such house cannot have this writ, because either house of Parliament is paramount to any other Court.—

Cro J. 543. This is a high prerogative
2 Ventr 24. & therefore by the Common Law issuing from the Court
3 Bac 3. of K. B. & Chancery & in some cases from the common
2 Mod. 198. Pleas, & Exchequer —
2 Bl. 131. 132.

But it never issues from the two latter, except in favor of some person who is actually or by fiction an officer or suitor of those Courts. In case of a commitment for a crime these two ~~last~~ Courts last mentioned, cannot discharge, but may take bail or remand.—

3 Bl. 132 It has been questioned whether Chancery could issue this writ in vacation.— But the last
2 Holes Ab. 147. decision was by L. Nottingham, who determined that it could not.—

3 Bl. 131 But the Court of K. B. may issue it in vacation; for the sovereign is at all times entitled to have an ~~account~~ account, why the liberty of any of his sub-

jects is restrained whenever that restraint may be inflicted.

3 Bl. 134. When the writ is obeyed, & the prisoner
5 Mod 22. brought before the Court, he is either discharged, ad-
1 Vent. 330 mitted to bail or remanded. Where the prisoners
346. application is to be discharged, the only question
Salk. 350. to be tried, then is, the legality or illegality of
2 Roy. 586 the imprisonment.
618.

But if he has been legally imprisoned, & is not entitled to bail, he is of course remanded.

3 Bl. 132. The Stat. 16 Car. 1st has left it optional with
2 Mod. 198. the Subject to demand this writ from either Court of Westminster Hall.

The great protection of this writ is that the subject need not be confined, when the Law does not require it.

3 Bl. 135. The provision of the common Law having
been evaded by the Stuarts, gave rise to the famous
3 Bac. 7, 8. Habeas Corpus act 31 Car. 2d. Tho' this has done little
~~3 Bl. 136.~~ more than to restore the common Law. In one respect
it differs, that any of the 12 Judges may issue the writ
3 Bl. 136. in vacation, & have it returned to his Chambers.

Sha. 142. But neither under this Statute or at com. Law does
10 Mod 499. it lie for persons charged in Execution by legal process.
3 Bl. 136. It will lie where the party confining has no pretence
3 Bac 9. of authority

Habeas Corpus.—

3 Ba. 15.
3 Keb. 526.
Bun. 606.
Stra. 982.
2 Lev. 128.
F. N. B. 68.
12 Mod. 166.
Bun. 631.

It will lie in favor of a Child against a Parent, a Wife against her Husband.—

A Friend of the party as well as himself may have it on application.

Disobedience to this writ is punished as other Contempts.—

499

500.

502

Of Practice in Connecticut

But first (as introductory)

Of the jurisdiction of our Courts of Law in Civil Cases.

I. Single magistrates, as Justices of the Peace, have original jurisdiction of all Civil Cases, in which the title of Land is not concerned, if the value in demand does not exceed 15 Dollars, and of all actions on note or bond, given for money only & vouched by two witnesses, where the demand does not exceed 35 dollars. St. 6. 26. 1 Sw. 107. Kirby 202.

But an appeal lies to the next County Court, if the sum demanded exceeds 7 dollars, except in actions on note for money & ut supra - in such case no appeal. St. 6. 26. 1 Sw. 107 R.L. 393.

But an arbitration note for for more than 15 dolls, & not exceeding 35 tho. vouched ut supra is not cognizable by a single minister of Justice - It is not for money only but substantially an obligation to abide the award 1 Sw. 108. 1 Root 99. 126. - if for more than 7 dolls - if for more than 7 dolls appeal must lie I suppose.

Practice in Connecticut.

Whether a note for ~~money~~ more than 35 dollars, but endorsed down below that sum, it being for money only, & vouched ut supra, is within his jurisdiction - Qu. Decisions of practice both ways / Bryne vs Bayne Resp. 9. 1 Sw 108. —

In analogy to ~~appeals~~ the rule of appeals from C. Cts. / It would seem that a note for more than 15 dollars & not exceeding 35. tho for money only & vouched ut supra, is not within his jurisdiction, if either witness is dead, or becomes interested - as by managing one of the parties - 1 Sw 108: 1 Root 223. 316. Kirby 387.

Civil Cam prosecutions / i.e. by forthwith process / are appealable by Deft however small the sums demanded are - of a criminal nature - 2 Root ~~516~~: 526: St. C. 142 -

If in actions of trespass brot. before a Just - & for an injury to lands Deft pleads title, the Just. cannot try the cause - The Deft must become recognized with one or more sureties, in a sum not exceeding 67 dolls to pursue his plea at the next C. Ct. in the County in which the land lies & to satisfy all damages &c St. C. 425-6 —

The Just. must then certify the record to the next C. Ct / St. C. 425-6: 1 Sw. 108. R. L. 362: — 2 Root 54: 359.

The Deft cannot in this case alter his plea in the C. Ct.
1 Root 344-5: 458.

If he does not pursue his plea in the County Court, the default shall be recorded, & a Scire facias issues from the C. Ct. on his recognizance St 426.

If he does pursue his plea & fails to prove his title Pltff goes agst him for treble damages & costs St 426. 2 Root 301. If he refuses to be thus recognized before the Just his plea shall abate, & on proof of the trespass Pltff must be agst him St 6. 426.—

If the Deft in such issue pleads the Genl issue & relies upon his title in the cause, the Justice may determine the cause as in other cases. 1 Root 549: 410. 458. Vide 2 Root 440.—

In actions brot for obstructing or raising the the water of a river &c brot before a Just. the deft pleads a right to do the act appeal lies to the C. Ct. & thence to the Superior Court. 1 Sw. 108. St 6. 30.—

Duty of 50 cents to be paid on every appeal from a Justice (St 149) It must be paid at the time of taking the appeal (2 Root. 11:12 — Subsequent payment is not sufficient. Query — Can the record of a Justice be contradicted to prove the fact (not St 6. 150.

A Justice may take a confession of judgment for a debt with or without suit, to the amount of 70 dol.

to be taken only from the debtor in person, record is made of the confession, & execution may issue - The record must ex. of the particular debt & duty - ex. gr. by bond - note book &c. St. 6. 248. In this case costs are allowed only for the Justices fee - unless there was an antecedent process & this must appear by the record 1 Sw. 108. Kirby 95 2. 236.

Not so of an arbitration note (1 Sw. 109) i.e. before the award 1 Root 328; 9. 2 Root 443. Justice may administer the oath prescribed by the Stat for poor debtors Stat 6. 221. 1 Sw. 109.

If in an action before a Justice a recognizance is taken for more than 15 dollars & the original Judgment exceeds that sum, a scire facias will not lie upon it before the Justice - but debt lies on the bond Ct. (R.L. 393.) Indeed no action lies upon it before the Justice St. 6. 39. and in all cases to enforce his own Judgments except agt. garnishee where the sum demanded exceeds 15 doll. (St. 6. 470 -

Note - a Scire facias is a judicial writ, issuing regularly from a Ct in which a Judgt has been rendered for the purpose of carrying the Judgment into effect - ex. gr. Ex. Garnishee - Special bail &c. Kirby 220. Tho it lies in some cases pending a suit & before Judgt. - Vide the Stat. of abatement & amendment -

Practice in Connecticut. –

It issues therefore only from the court which rendered the judgment, or in which the original suit is depending Stirly 220. & regularly only from the Ct. to which it is returnable — exception in case of fin-fa. cost garnishee for more than $15 on a judg.t rendered by a justice — In this case it is signed and issued by the justice, but returnable to the C. Ct. (1 St. C. 470 —)

If a justice having rendered judg.t in any case, dies or is removed before ex.n granted, or satisfyed — debt lies on the judg.t — and if the debt or demand does not exceed $35 the action may be brot before another justice & and no appeal — If it exceeds that sum — before the C. Ct — But it must be brot within 5 years from the death or removal St. C. 29 —

A justice cannot try a cause out of the Town in which he dwells, except where there is no justice in the Town in which the cause is to be tried who is qualified to determine it (1 Sw 109. 1 Root 202. 300. 313. St. C 26. — Semb — in criminal cases — 2 Root 357. St. C. 142. —

But the Gov.r Lieut. Gov.r assistants & judges of the Supr Ct may respectively execute the office of justice throughout the State —

But when acting as single magistrates

they have no other judicial powers than a justices — Their jurisdiction is the same as to subject matters St. C. 247 —

Appeals from justices must be entered in the docket of the C. Ct before the second opening — May appellee enter, if appellant ~~do~~ fails, as in Supr. Ct — such is the practice —

II. The several Cts of Com. Pleas (or C. Cts) have original jurisdiction of all civil causes (at Law) not cognizable by a single mag. — So that all civil actions not thus cognizable are regularly commenced before these Cts — 1 Sw. 101. St C. 28. —

Of all civil actions except on bond or note (ut supra) in which the title of land is not in question & if the matter in demand surmounts the value of $15 but does not exceed the value of $70 & of all actions on bond or note, given for money only & vouched by two witnesses, if the sum in demand exceeds $35. they have final as well as original jurisdiction except that their judgt may be reviewed by writ of Error — 1 Sw. 101. St C. 28. 127. 129. Ritch 280. 1 Root 297.

But an appeal to the Supr. Ct lies from their judgts regularly in all cases in which the title of land is in question 2 Root 440 and in all cases in which the value of the matter in dispute exceeds the value of 70 dolls except in actions on notes (ut supra) given for money only and vouched by two witnesses St. C. 28. 127. 129. 1 Sw. 95. 1 Root. 148. —

In an action for trespass on land demanding not more than 70 dolls no appeal lies — unless title be pleaded 2 Root 440. — Evidence of title under the gen. Issue is not sufficient —

But it has been decided that the right of appeal does not depend upon the sum demanded, as damages, except where the damages are presumptive, in case of tort. 1 Sw. 95. and where in case of tort the damages cannot be ascertained without introducing evidence extrinsic - 1 Root. 148. 5-18 —

The rule is this if it appears from the record that according to the rule for ascertaining damages Judgt cannot be rendered for a greater sum than 70 dolls (the title of land not being in question) no appeal lies - If granted it will abate, or the Judgt indeed in the Supr Ct in such a case may be arrested. 1 Root 5-25 Eg. gr. Pltff in book debt - Pltff avers that Deft. owes 70 dolls. and demands 80 - So on a note or bond for 20 dolls. eg gr Sw. 95-96. Kirby 280. 1 Root 302: 127. 238. 276. 5-18. Such a case will be dismissed by the Ct. ex officio. 1 Root 5-25: 2 do 370. 347. - Kirby 35. 2 Root. 137-42.

So if the Pltff. in book debt declares on a debt of more than 70 dolls. & demands more; yet if it appears from his own book, or over that no more is due; the Deft by placing it on the record, in his objection in the C Ct. may prevent the an appeal 1 Root 518. 1 Sw. 96. Kirby 278.

In action on arbitration note for more than 70 dolls. if it appears from the record that neither the matter

in controversy, nor the award exceeded 70 dolls. no appeal lies (1 Root. 127. 238. 1 Sw. 95. 6. - tho' if the note is for more than 70 dolls. - the case is prima faie appealable -

In an action on a note or bond for more than 70 dolls. given for money only, if counted by two witnesses, if one is dead or becomes interested, an appeal lies to the Supr. Ct. 1 Root 223. 316. Kirby 387. Con. 1 Sw. 96. 1 Root 566.

In an action upon a receipt agt. an officer for not executing an ex.n no appeal lies whatever the sum demanded is St 385. 1 Sw. 101. Root 153 (Seems if it is for not executing mesne process, except where action is brot before a Justice or for not executing an ex.n on a judgt confessed before him for more than 7 dolls. St 380 - So in action on a receipt by an officer or st a receiptsman of personal property taken in ex.n St 386. 387. 1 Sw. 101. (Seems, if taken & receipted upon attachment. 1 Kirby 40. -

So on Judgt rendered upon an award of auditors. St 37. 1 Sw. 97.

If a cause is not appealable by the St - no agreement of the parties in the Ct. appealed to can make it so. - Engr. agreement to increase the damages by amendment 2 Root 60. 377. 8. -

No appeal lies from a judgt by default, unless there was a hearing in damages - The deft is not otherwise supposed to be in Ct. 1 Sw. 96. Hurlg. 17. 1 Root 566. and in this case he can be heard in the Ct appealed to, only as to the damages. 1 Root 566.

But on judgt upon nil dict, appeal lies - as the deft is in Ct. 1 Sw 96. 1 Root. 109. - and the Deft may plead & defend in the Ct to which he appeals - 1 Root 566 -

No appeal lies from the C Ct in a qui tam prosecution for a crime - It is in form & partly in effect a criminal proceeding 1 Sw. 96. 1 Root 403. Hurlg. 269.

No appeal lies to an adjourned Ct - Hurlg 366. 1 Sw. 96. - The appeal must be taken to the next Supr Ct. - St 28 -

Appeal may be taken from a judgt on a plea in abatement without waiting for judgt in Chief - But if Deft appeals from such judgt & does not make good his plea in the Ct appealed to - Costs shall be awarded gst him on the judgt on the plea in abatement, & ex: issue tho he should prevail on the merits St 22. 2. Sw 269. 1 Root 564. & he cannot alter at the Ct above - 1 Root 564. The appeal must be taken during the Term in which judgt

is rendered (1 Sw. 96. St 28. It may be taken at any time during the Term — but it is prudent to move for it immediately after verdict — as an issue to the Ct after Judgt Sens. ex.t may issue, and a subsequent appeal it is said is no supersedeas —

Appeals to the Supr Ct must be entered in the Ct. Ct before the second opening of the Ct, or the appellant must advance the whole costs to the time of entering — and he cannot enter at all after the Jury are dismissed (1 Sw. 96.) — St 28 —

Appeal destroys the judgment appealed from — unless the Ct appealed to wants Jurisdiction — and even then I suppose the judgment is suspended till the appeal is quashed above —

But if appellant does not enter before the Jury are dismissed, the appellee may enter afterwards & have the Judgt affirmed with additional costs St 28. — 1 Sw. 96. or he may sue on the bond — The judgment recovered in the Ct above is a distinct substantive judgment — except in case of appellees entering —

Fee of one dollar, payable on every appeal from the C. Ct — St 149. 1 Root 495. 2 Root 11. Kirby 51. — If not certified the appeal is void. Kirby 51. It must be paid at the

time of taking the appeal or the appeal will abate 2 Root 11.12. Qu. Can the record of the Ct be contradicted to prove the fact — Seems not St. 150.

It has been decided that an audita Querela is within the St. as to appeals & of course appealable from Ct to Supr. Ct — 1 Root 56 —

Either party may appeal, if Pltff recovers any thing less than his whole demand — seems — where Judgt is either in his favor he cannot 1 Root 318. — 2 Root 370. or both may appeal & if either enters it is sufficient —

If appeal is denied where it ought to be allowed, error lies. 1 Root 56. 518. So if allowed & the Ct above does not quash it 2 Root 377. Qu. will error lie immediately on the allowance of the allowance of the appeal — I should think not, as advantage may be taken in the Ct appealed to —

If a case is not appealable, & motion for an appeal is made, objection may be made to the motion, in the Court in which pr 1 Root 518. — or the appeal may be abated in the Ct to which pr Kirby 278. Root 302. 127. or if a verdict is given agst him in the latter Judgt may be arrested 1 Root 525. or the cause dismissed by the Ct ex officio 1 Root 525. or writ of error lies if Judgt is agst him in the Ct above —

Practice in Connecticut.—

The time allowed for pleading in abatement of an appeal is the same (it seems) as is allowed for a diverse ~~[illegible]~~ pleas in abatement. 1 Root 525 564.

III. The Supr. Ct. has no original jurisdiction in civil causes properly so called St. 127, 8: 1 Sw. 94-5.

It has indeed original jurisdiction when a suit is brot agt an officer upon the St.* for not executing a writ returnable to an on ex.: issued by itself St 385-1 Sw 97. 2 Root 251. action may be brot to the C.Ct. & this is the usual practice 1 Root 90.-

This Ct indeed issues writs of Sci-fa- returnable to itself to enforce its own judgt- but this is a judicial not an original suit- & it generally grows out of the appellate jurisdiction of the Ct. St. 28. 1 Sw 97.- It has appellate jurisdiction of many causes determined in the C.Cts.- (explained ante, division II) It appellate jurisdiction of causes decided by the Cty Cts is the same as of those decided by C.Cts - Vide the Sts - and an appeal lies to this Ct from every sentence - order or decree of the Cts of Probate 1 Sw 97. St. 133-4 For its equitable jurisdiction see powers of Cha.

It has jurisdiction of all writs of Error but for the reversal of judgments rendered by C-Cts or single mag. (in civil & criminal cases - or of decrees in Equity passed by C Cts St. 161-2 1 Sw 97.- When on reversal the Ct. would enter his action in the S. Ct for trial, it must do it, in

* But this is not properly a civil suit

the term, in which the judgment of reversal is rendered. 1 Root 85.

As jurisdiction in cases of divorce mandamus Prohibition & habeas corpus are treated of under their respective titles St. 347.

Note — A party may appeal from a judgment on a plea in abatement (when an appeal is by law allowed) without proceeding to final judgment in the Ct below. and if a deft after judgment of a respondeas ouster pleads to the action, instead of appealing, he cannot upon appeal from final judgment take any advantage in the Ct appealed to, of his plea in abatement — Usage —

IV. The Sup. Ct of Errors has jurisdiction in all respects final of all writs of Error but for the reversal of any judgt or decree of the Supr. Ct in matters of law or Equity when the Error complained of is apparent on the record – but has no cognizance of Errors in fact – St. 126-7 –

V. The Genl Assembly has cognizance to petition, of cases, in which no other Ct can grant relief, provided the matter in demand exceeds $25 –

Of the proceeding by which civil rights are enforced in our courts of justice. –

An action or suit is defined to be the lawful demand of one's right 1 Bl. 116 –

The first stage of a suit in Chancy – is the writ & declaration which issue together 2 Sw. 188. St 24. –

I. The writ consists of all that precedes the statement of the Pltffs ~~declaration~~ claim, of the signature, the certificate of a duty paid, & the recognizance when there is one – the date is common to the writ and declaration 2 Sw. 188 –

The process contained in an

writs is of two kinds - 1 By summons - 2 By attachment. St 24. 2 Sw. 188.

By process is meant the means of compelling the deft to appear in Ct. - or in Com. of holding him to Trial - 3 Bl 279. 2 Sw 188.

In Com. as the declaration issues with the writ it is not necessary to entitle the Pltff. to Judgt. that the deft. should appear in Ct - 2 Sw. 193 Stews. in Eng. - 7 Term. 6. - By St 12 Geo. 1 a common appearance may be entered, that is, Com. Bail filed for deft. by Pltff. Tidd 125. -

This process contained in the original writ is called original or mesne process, as contradistinguished from final or process of Ex. 3 Bl. 279 -

In Eng there is a process distinct from the original writ (3 Bl 273. 279. 280.) when the writ is a praecipe; Stews - when a fi. fecerit te securum 3 Bl 275 & append. VII. XIII. -

In Eng. a writ agst. 2. & declaration agst. one only, is regular, in case of tort. 1 Bos. & Pull. 19. 49 -

The writ must be signed by a magistrate as a Justice, assistant &c. or by the Clerk of the Ct to which it is returnable; & must describe the Ct. to which & the time & place of its session St. 24. 2 Sw. 187. -

A sic. fa. on a Judgt. rendered by a single mag.

must be signed by him, even when returnable to the County Ct. St. 470 –

It commands the officer or person to whom directed to summon, i.e. to give notice to deft. to appear; or to attach his estate or person, & have him to appear before the Ct &c. St 24. 212. & 2 Sw. 187 – It is usually directed to the sheriff of the County in which the deft. dwells, his deputy or other Constable of the town in which he / St. 24 2 Sw 184. St 383-4. – Constables have in general the same powers within respective towns as Sheriff in their Counties St. 384 1 Root 407. – A Constable chosen & sworn in one year, & rechosen, may serve process before he his sworn a second time 1 Root 83-4. 1 Stra. 625. –

It may be directed to the Sheriff only – or a Constable only –

And a writ directed to the sheriff may be served, by his deputy, tho' not named – So by a special Deputy Ply 240 – Cowp 403. 1 Bl. 116. 339. Salk. 12 – 95 – 6. Holt 221 Ld. 12. 13. Bl R. 332 – So in Eng. –

Ordinarily a writ can be directed to no other than one of the above officers – But if such officer cannot be had, without great charge and inconvenience, it may be directed by the mag. to an indifferent

ent person. But the name of the person must be inserted by the mag. on his hand in the writ & the reason of such direction must appear in the writ St 124. 1 Sw. 187. 1 Root 284. 2 do 72. — Such direction usual in what cases? when the time of service is expiring — when Deft avoids officers &c. Qu. must the reason be inserted by the mag. himself? So it seems from the St 124 & from 1 Root 284. 1 Sw. 187. But the constant practice is otherwise. — See the new St. for this purpose.

The indifferent person need not make oath to the truth of his return 1 Root 284-5 Sewell — of a Special Deputy Sheriff — St. 386. —

That the indifferent person is bondsman for prosecution does not disqualify him — So as to Sheriffs — and Constables. — 1 Root 328. —

The certificate of the mag. as to the necessity of directing to an indifferent person is conclusive 1 Root 284-5 Tilt 6 — 2 Sw. 188. — It was holden once by the Supr. Ct that a direction to the Deft. or an indifferent person was ill; but that a direction to the Sheriff and an indifferent person would be good — 1 Root 285. Qu. as to the last branch —

If the return of a writ directed to an indifferent person, is altered from one term or time, to another, the writ will abate — The necessity might

exist at one time & not at another. 1 Root. 2 Root 389. A writ agt a town may be directed to an inhabitant of the town as an indifferent person. 2 Ro. 188. A writ directed to a minor as an indifferent will abate. 2 Root 519. A constable having begun service within the limits of his town (as by attaching property) may go into another to complete it — as to leave a copy — (Blake vs Ranney 6 Ct) Service Vide 1 Root 407. A writ agt. a Debt of the town of A. may be directed to a Constable of the town of B — & if he makes service in the town of B. it is good — but he cannot serve it in the town of A. — 1 Root 407. All writs or declaration drawn by Sheriff or their Deputies, or Constables, except in their own suits shall abate 1 H. 387. A Deputy Sheriff cannot, I conceive, serve a writ for or upon the Sheriff — since he acts for the Sheriff and under his authority — But one Deputy may, clearly I conceive, serve a writ for or upon another — as the Sheriff may serve for or upon his deputy — Beebe vs Phelps Com. Pleas — Feb. 1803

A Writs must be signed by a mag. — as Justice &c

But a Justice can issue original process any throughout the County in which he dwells 2 Iw. 187. 1 H 247.

Practice in Connecticut.—

To arrest a delinquent before himself he may issue criminal process — & process of ex.r in civil cases throughout the State — So he may issue a summons or Capias for witnesses in the first case through the State St 247. 175. Thby 182. —

A Justice may issue a writ in favor of the town in which he lives, & of course I suppose agst it — 2 Sw. 187. 8. 1 Root 175.

Clerks of the Cty & S. Ct can sign writs returnable to their respective courts, but no other — St 24. 1 Sw. 100. — According to usage writs of Error must be signed by a Judge of the Court to which it is returnable 2 Sw. 277. — not to be issued without probable foundation for Error St —

Formerly the Clerk of the Supr. Ct could issue mesne process returnable to the Supr. Ct in any part of the State — Qu. now, since there is a Clerk in each County? —

But the Clerks of both the Supr. & County Cts may clearly issue process returnable to their respective Cts (St 24: 129. 131.) throughout their respective Counties. —

They may also (I suppose) issue mesne criminal process returnable to their respective Courts in any part of the State — i.e. in term time under

the order of the Court)

Formerly Judges of the County Cts. & Justices of the Quorum - could not issue original civil ~~any criminal~~ process out of their respective Cty. But afterwards enabled by St. to issue such process into any part of the State, if returnable to their own Cts. 2 Sw. 182. St. 247. -

Now by Statute they are enabled to issue process in all civil matters to be served in any part of the State, whether returnable to their own or any other Cts. - St 499. -

The Gov.r Lieut Gov.r Judges of the Supr Cts. Assistants (an now Judgs and Justice of the County Cts. ut supra) can in all civil cases can issue mesne as well as ~~civil~~ final process that will run thro' the State. - St. 247. 499. -

The writ describes the place in which the Deft dwells - So that in which the Pltf. dwells - These in ordinary cases are the only necessary additions St 212. pl But when the office or civil character of the Deft. or Pltf. is the inducement to the action, that must be added - ex gr. Sheriffs &c (Vide Pleadings) -

On all writs in civil cases there must be paid an duty at the time of their issuing. -

If returnable before a single mag. 17 cents to Ct 34 cents — Supr. Ct $1.00 — S. Ct of Errors 2 dolls. — On petitions of an adversary nature to the Genl. Assem — 2 dolls. St. 149 —

Payment of the duty must be certified on the writ, in words at full length, by the mag. signing St. 150 — otherwise void — if the cause may be entered pro the docket, without a plea — 1 Root 505. 175. —

The writ cannot be amended, by inserting the certificate, even tho the Pltff offers to pay the duty in Ct — 1 Root. 505. —

And a writ once filed agst one person cannot be converted into a writ agst another, unless there is a further certificate of the payment of a second duty — If it is the Ct may expunge dismiss it and tax costs for Deft. — St. 150 —

The same duties are payable on qui tam prosecutions. 2 Root 526 — Not on public prosecutions (ex) by informing officers &c — Decided by the S. Ct that the Pltff may take advantage of the want of a certificate of duty paid by writ of Error — after judt for Deft / Aug. 1805. Litchfield Cty —

On every writ of attachment the Pltff must give sufficient security to "prosecute this action to effect" & to answer all damages in

case he make not his plea good (St. 24 - 1 Root 563 -
the security is to be taken to the adverse party St 24. - as
all bonds for prosecution are, - it seems Kirby 378. -

This security is called a bond for prosecution - and
is generally by way of recognizance, acknowledged
before the mag. signing the writ, and at the time of its
issuing - St 24. 1 Root 563 -

In Eng. security may be
required of foreign Pltfs. not residing there - but of
no others (1 Bis & Putter 96. 2 H Bl. 383. 384 -
Qu. Is the recognizance intended as a security for
the property attached or only for the costs? - not de-
cided - I believe - It is gen.l supposed to be a security
for costs only (Qu.) For costs it certainly is a security)
But has been decided that the Pltfs recognizance is sufficient if he is of ability to pay costs (Supr Ct Fairfield
County Aug. 98. - If the Com-mentator is to receive his
recognizance - This decision was founded on usage
Root. 166 -

If however the object of the bond is to secure
costs:- this practice is useless: for the Pltf. is liable for
costs, without it - and if the object it to furnish a se-
curity for the property attached; the provision of the
Statute is defeated - the latter, I conceive, was the
object of the St. - Sed Qu. - If however the Pltf's se-

surety is insufficient, a new bond may be ordered on motion to the Ct to which the writ is returnable 1 Root. 166 —

It has lately been decided that a bond for prosecution on a blank writ, was not good & that the writ must abate — Because it could not be taken to the adverse party (S Ct — New London County.) —

According to usage bond for prosecution must be taken on all qui tam prosecution by forthwith process. — as the Defts body is attached (or arrested) Lewis — where a qui tam civil action is brot by process of summons — Here the rule is the same, as in other cases of summons —

Bond for prosecution must be ~~taken~~ given by some substantial inhabitant of this State in every case in which a writ issues in favor of one who is not an inhabitant of this State St 24. even tho the process is by summons —

If the writ is not given in the above case the writ may be abated —

No bond for prosecution is to be given by some substantial inhabitant to on the issuing of any writ, if it appears to the authority issuing, that the Pltff tho, an inhabitant, is unable to respond the costs,

that may be recovered. At 24. But in the last case, I conceive, the writ cannot be abated, in the Ct to which it is returnable, for want of a bond. For the signature, I suppose is conclusive evidence that the fact of the Pfts inability to pay costs did not appear to the magistrate. But in this case the Pft. is in motion by Deft., & proof of his inability, in the Ct. to which the writ is returnable compellable to give bond for prosecution with sufficient surety, or to be non-suited. As if his inability arrived after the writ issued At. 29.

But such motion should be made in a reasonable time, if possible. Motion after the jury was impannelled to try the cause, decided to be too late. Kirby 344.

If the security taken is apparently sufficient at the time, the mag. is not responsible, on its proving insufficient — as if the bondsman fails (1 Root 168.) & the rule holds even tho' the Pfts sole bond is taken. it seems.

So on writ of replevin, if the security is apparently sufficient (ut supra) he is not liable. Except when Pfts bond is taken. in this case if the Pft. is not eventually sufficient of ability sufficient to pay, the mag. is, at all events, liable. this cannot be apparently sufficient. For it takes the creditors security away, that is the property attached, & leaves him as if nothing had been attached. 1 Root 165. 168. 56. 261. At 360. It requires se-

unity to prosecute &c & to satisfy and answer all damages, demands, & duties &c —

On every writ of Error bond with surety must be given that Pltf. shall prosecute &c and answer all &c 1 162 — The Pltf's bond not good

Every party appealing from the Judgt. of one court to another must give bond for prosecution, with surety — appellants bond not sufficient — 1 28. 30

Formerly not required on appeals from a Justice 1 Root. 208 —

The appellant and surety are bound that the former shall prosecute his appeal to effect &c — By this is not meant, that unless appellant prevails, that the bond is forfeited — but that it is if he does not proceed in the appeal: For the appeal destroys the Judgt. —

If appellant does prosecute his appeal ~~claim to effect~~ and fails, the surety is liable for Costs; if they are not paid by the appellant — & for all the Costs before and at the appeal 2 Sw. 173. the bondsman and an appeal by the Deft. is liable only for the Costs subsequent to the appeal here —

But he is liable for Costs only, and (and not for them, if collectable from appellant) —

Is it necessary for appellee to take out ex.r and have a non est returned as to the appellants personal property &c. It is said Root 315. that non est. is not necessary to subject bondsman for costs. &c. Then Sci-facias will issue lie on the recognizance, or debt, I suppose. Golden first (Root 315.) that the return of non est is not necessary to subject Pltfs bondsman on an appeal &c.

The proceeding the is the same in the other cases. of bonds to prosecute (ante) &c. non est. as to the principals personal property, that the surety is liable. the imprisonment of the principal on the ex.r will not discharge the bondsman. (Root 85-6 Indeed nothing but payment of the costs discharges him.

The giving of special bail does not exonerate the Deft's bondsman, on appeal. Nor does the bond on appeal, when Pltf. appeals, discharge the bondsman for prosecution of the original process.

Bondsman for Pltf. on appeal is liable for costs, if Deft. prevails tho Pltf dies before the return of the ex.r (Root 314. &c, I suppose c converso, if deft. appeals, and dies (ut supra) when Pltf. prevails.

Bonds for prosecution not within the St. of limitations as to bail. Vide

post - Bail - St 39. 1 Root 563: 365 - 2 Sw. 175 -

Death of the Pltff. before judgment discharges the bond for prosecution 1 Root 259. -

A judgment in favor of the appellant is final as to the bondsman on the appeal, tho' on a new trial judgt. is given for the opposite party 1 Root 569. - So I suppose if the first judgt. is reversed by writ of Error 1 Root 102. 567. 2 Sw 175, 6 -

In transitory action to be tried by the Sup or County Cts. the writ is to be made returnable in the Cty in which the Pltff. or Dfdt. dwells - St. 26. 2 Sw. 191. -

This rule holds ex officio at Com-Law upon receipts for exs 1 Root 90, 1 St. 384. But when they are complained of under the St. - the suit must be brot. to the Ct. to which the exn is returnable - So of orig.l writs 1 Root 90. St 384. tho' it may be in a different County before the Supr. Ct (Kirby 113.) if either party dwells there -

When the title of land is concerned the writ must be returnable to some Ct in the Cty in which the land lies - St 26 - 2 Sw. 191. -

A qui tam action

may be brot in the County in which the Pltf. or Deft. dwells, as in com- civil actions Stat. 402 Rev. Ch. 645.-

Suits before a single magistrate must be prosecuted in the town in which the Pltf. or deft. dwells, except when there is no mag. in either who can lawfully try the action -- then Pltf. may sue before a mag. in one of the towns next adjoining his own St. 26.-

But a writ of Error brot to the Supr. Ct must be returnable in the County in which the Judg.t com- plained of was rendered 1 Root 257.- So of petitions for new trials 1 Root 255.-

In transitory actions in Eng. the venue may be changed, on motion, for reasona- ble cause - not of course - if never by plea 1 Bos. & Pull. 20. 1 Bar 35.- Salk 669. 670.- 7 Term 735.- 3 Bl. 294. Sta. 874.- -

Time of Return.-

Writs returnable to the by Cts must be returned to the Clerk's office on or before the day next preceding the first day of the term St. 25.-

Later returns are, however, allowa- ble if consented to by the parties - So without consent

under extraordinary circumstances — as if an accident befalls the officer, on his way to the office, or if he is suddenly taken sick, just before the session —

All writs & petition returnable to the Sup. Ct. must be returned to the Clerk, before the second opening of the Ct. — 1 Root 563 —

Writs returnable to the Cty or Sup. Ct. must be made returnable to the term next following the date, if there is sufficient time intervening 1 Root 315 316. — Semble it is error — & I suppose void — as in Eng. 3 Wils 341. — Please —

II. Of Process and Service.

This is of two kinds. Summons, & Attachment (ante). 1. When the process is a summons, service is made by reading the writ in the hearing of the Deft. or leaving an attested copy with him or at the place of his usual abode (R. 24. 5. 2 Sw. 188. 1 Root 49.)

When husband & wife are sued one copy is sufficient 1 Root 475.

If the officer makes service by reading, and indorses service by reading, instead of the leaving a copy, which is not true, will not abate the writ 1 Root 497.

An acknowledgment of service, indorsed by deft's attorney not specially authorised to do it, does not conclude the deft. He may abate the writ 1 Root 506, 7. Qu. has it not been decided that such acknowledgment by Deft himself, does not conclude him?

Decided, that petitions must be served by copy 2 Sw. 471. Qu. as to writs of Error (2 Sw. 277.) It has lately been decided by the Supr. Ct. that writs of Error may be served by reading. Aug. 1807. L. County.

On petitions for new trials and writs of Error, if the Deft. lives out of the State, ser-

vice is made by leaving a copy with his attorney here 2 Sw 187.

If a person residing out of the State is found within it, a summons served upon him by reading a copy is sufficient to hold him to trial & fees — 2 Sw 189 —

2. Attachments, are regularly served by attaching the property or body of the Deft. # 24. 2 Sw 189 —

For the com. Law — relating to arrests see Sheriffs

But it is well settled that service by reading a copy, is sufficient to hold Deft. to trial — not cause of abatement — tho' the officer may be liable to Pltf. / 1 Root 54. 128. 563 — 2 Root 130. 346 —

The officer has no right to take Deft's body, if he can find personal Estate sufficient to answer the demand, & which he knows to belong to Deft. 2 Sw 189 — # 34. — / Sems — at com. Law / Sems, if it is not sufficient

But the officer ought not to be liable, to Pltf. or Deft. for omitting to take personal Estate, if he is doubtful to whom it belongs (Humphrey vs Robbins C. Ct Sept. 1803)

At com. Law the officer in such case may summon a jury to ascertain to whom it belongs — and if he does

not he takes or omits to take the property at his peril 4 Tem 633. 648. 2 Hill. 438. And the Deft. it would seem, has no cause of complaint for the taking of his body, unless he tendered personal property to the officer —

It has been decided by the Supr. Ct that the officer having taken the Deft's body, is bound before commitment to accept personal property if tendered, & to discharge the body — 2 Sw. 190 — Semble liable to Deft. in false imprisonment — So of arrests on final process 1 Root. 120. Ct 34. 174. Decided contra by the Ct of Errors — 1 Root 124. but holden that the officer may do it — And he cannot hold both property and body —

He may not break the outer door of the Deft's house to make an arrest — an inner door he may Comp 1. : 2 Bl. R. 893. 5 Co. 93. 2 Bac 367. Trinly 383. —

The Deft's land is also liable to be taken by attachment; but the officer is not bound to take Land, when he can find the body — nor, indeed, is he justified, as against the Pltf. in so doing, unless he is so directed by the Pltf. 2 Sw. 190.

An arrest of the body may be made by an assistant of the officer in his company — not out of it — tho' he may be out of sight Esp 604. —

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Bos & Puller 26. Comp 64.—

If property, real or personal, is attached, the officer must leave with the Deft or at his usual abode, if within this State, a true copy of the writ, with a description of the property attached St 34.5. 2 Sw. 190—

If real estate is attached the officer must also leave a true copy &c at the town Clerk's office within 7 days next after attaching the Estate & before the time for serving the writ has expired — Sams, it is not holden agst any other creditor or bona-fide purchaser 1 Thrly. 103. St. 35

But the omission of the copy will not abate the suit — it is intended merely to give notice to other creditors & purchasers — St 35. 2 Sw. 190—

Personal property attached is not holden to respond the Judgt. (either agst the debtor or any other) unless ex.n is taken out and levied upon it within 60 days after final Judgt — i.e. the lien is lost — except where it is under a prior incumbrance, and then it is not holden unless ex.n is taken out, and levied within 60 days after the incumbrance is removed St 35. 2 Sw. 189. 190 — Thrly 40. — So, the lien on real Estate is lost

unless ex.r is levied upon it, if the levy and appraisal are recorded within 4 months, except in the case of a prior incumbrance, in which case the proceedings must be completed within 4 months after the incumbrance removed. N 35. 2 Sw. 190.

It has lately been decided that the officer cannot attach real Estate without entering upon it S. Ct. New Haven 6 ty. July 1803.

If a person in custody of an officer under an arrest in one cause, delivering to the officer an attachment agst. the same person, for another cause, is a good arrest Esp. 605. 5 Co 89.

When personal chattels are attached the officer regularly takes the same into his custody, & holds it for the purpose of levying the ex.r upon it. 2 Bl. R. 1218. But he can retain the property for this purpose no longer than till 60 days after final Judgment 2 Sw. 189. N 35. Within this time ex.r must be levied or the lien is lost.

The officer may, however, & frequently does deliver the property to a receipts man, i.e. to some individual who gives a receipt for the property & promises to re-deliver it to the officer at a time certain, or on demand Thly 40. 2 Sw. 189. 190. N 386.

But the officer takes the receipt at his own risque, and is not obliged to do it in any case. 1 Root 153 — Same practice on exs. 1 Root 92.

The receiptsman is not bound by a promise to redeliver the property after the expiration of 60 days &c — except in both cases where the goods are under a prior incumbrance — in this case the trust remains until the expiration of 60 days after the incumbrance is removed. 2 Dev 190 — Phily 40. 1 Root 481 —

If then the promise is to redeliver on demand — and no demand is made within 60 days &c the receiptsman is bound to deliver the property back to the Deft. & on refusal is liable to him in trover Phily 40 — 1: 1 Root 481 —

In an action on such receipt it is not necessary for the officer to aver in the declaration that the judg.t or exc. remains unsatisfied 1 Root 92 —

Visible property within the State tho belonging to a person out of the State may be attached and the attachment of it will hold the owner to trial 1 Root 447. In the last case must not the action be brot. in the County in which the property is, I — 1 Root 447. — the action will lie even if the Pltff. also

lives out of the State — So invisible property as debts due to a debtor out of the State may may be attached St. 137. 139. 2 Sw. 189 —

If visible property belonging to an absent or absconding debtor, is not exposed to view, service is made by leaving a copy of the attachment with the Attorney, Agent, factor or, trustee in whose possession the property is — and this service alone is sufficient, unless the absent debtor is an inhabitant of this State, or has dwelt in it; in which case a copy must also be left at his last or usual abode in this State St. 138. Thily. 4. 1 Root 387 —

Same rule when invisible property as debts due the absent debtor is attached St 139. 1 Root 387 —

But in all cases where the Deft. is out of the State, at the time of the action commenced, and does not return before the first day of the term, the case must be continued to the next term — & if at the term the Deft does not appear, by himself or attorney & it appears probable that he has had no notice of the suit, the Pltf may continue the action to the term next following & no longer: at which time if he does not appear, Judgt. is to be rendered by default St. 25 But in all such cases exc. is stayed till Pltf. lodges with the Clerk a bond in double the amount recovered

with one or more sureties, to refund to the deft what he may recover of the Pltff by reversing or annulling the Judg.t. If suit to be brot within 12 months after entering up the first Judgment St 25: 1 Sw 335, 6

If no bond is lodged, the judgment is erroneous 2 Sw. 267. 1 Root 176 – It was once decided that the Judg.t was void – The decision is since denied. 1 Sw 335. 6 – 1 Root 176 –

The statute provides that real Estate taken upon such ex.n shall not be aliened, till after the expiration of 12 months, or after a new trial had on a suit brot within 12 months St 25 –

By a late Statute if action is brot agst a Deft out of the State (ut supra) before a single mag. if there is no appearance for the deft, the action shall be adjourned for a term not less than three months and exceeding 9 mo." & then without special notice alledged for. the action shall come to trial – St 470 –

A Judg.t is rendered by the mag. agst the absent debtor. the Sci-fa agst the garnishee is to be signed by the mag. who rendered the orig. Judg.t unless he is removed by death, or otherwise, before the Sci-fa. is sued out, in which case it may be signed by another magistrate – St 470 –

And when the demand, does not exceed, in

the fa. fac. § 15. it must be made returnable before the magistrate who rendered the orig.l judg.t or if he is dead, or removed, (ut supra) before another magistrate — But if the demand exceeds 15 dolls. it must be made returnable to the C. Ct. in the County in which the Plff. or Deft. in the Sci. fac. dwells — St 470 —

Miscellaneous Rules.

In actions on joint promises or contracts, if all the defts are not inhabitants of this State, service upon such of them as are, is sufficient to hold them all to trial — In this case the suit is not continued of course, but if any of the Defts not of the State, are aggrieved by the judg.t they may be relieved by audita Querela — St 25. 6 —

But if one of the Defts. tho not of the State, is an inhabitant of it, so, that service upon him (by leaving a copy at the place of his last usual abode is necessary St 25. 138.) the cause must be continued one term at least, (ut supra) — For in this case the Statute does not give relief by audita Querela St 25, 6. If not continued judg.t is erroneous — S. Ct Middlesex County on writ of Error —

If Deft. is under the care of a conservator, the latter should be cited, to appear, but if he is not cited,

the writ does not abate; but time is allowed to cite him Phil. 176. - 5 - The officer may not break the outer door or window of the Deft's house to arrest him or take his property - Semble of inner door - Comp 1. 5 Co 93. 2 Bac 367. Phil 383 - Deft. may be discharged by the Ct. arrested on Sunday - the arrest is void by St 29 Car 2. and our own - So by an Statute - service of any civil process - Esp 605 - St 370 - 2 Bl R. 823 - But one's house is privileged only for himself, his family, and his own goods - If any other person or another's goods, are in it the outer door he may at his request, be broken to arrest him, or attach his goods 5 Co 93a 6 Co. E. 545 -

When towns, societies, proprietors, or other communities are to be sued, service is made by leaving a copy with the Clerk, or either of the select-men or committee-men St 116 - In Eng. a prisoner in custody for an offence, cannot be served with civil process, without leave of the Ct or one of the Judges 4 T. R. 317 - 1 Bl R. 129 - Quere in Con -

Time of making service -

In suits bro't to the S. Ct - or C. Cts the time of legal notice in ordinary cases is 12 days i.e. process must be served on Deft. 12 days inclusive, before the day of the Cts sitting - In suits before single mag. 6 days inclusive St 24. 2 Dw. 188. -

But in suits agst. towns, societies, proprietors, and other communities, the writ before a single magistrate service must be made 12 days before the day of the Ct's sitting St. 116. 1 Root. 109 - 2 Sw. 188, 9 -

And a suit by foreign attachment before whatever Ct returnable must be served by leaving a copy with the Garnishee (and as the case may be, at the Defts last usual place of abode - 14 days, at least before the sitting of the Ct - St. 138. 2 Sw. 189 -

So, in suits agst. officers for not executing a writ, or for not returning it, or for making a false return, the time of legal service is 14 days - St. 385. 2 Sw. 189 -

This rule holds I conceive only in cases of complaints under the Statute - and not in the ordinary suits at Com. Law - ex. gr. - on officers receipts &c that the latter are Com. Law suits see 1 Root - 90 - 1. St 384 - Qu. whether it does not extend to all suits at Com. Law - Judge Reeve informs me that the S. Ct have considered the provision as extending to all suits agst. officers for not executing writs &c - that they may have two days to seek their own remedy - In all these cases the day on which the writ is served, is included

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in the computation of the time, & that on which the Ct sits is excluded –

And if service is made on the last day allowed for service; it must be completed before the evening twilight is gone, while there is light sufficient to enable the officer to read the process –

Qui tam prosecutions brot to recover penalties, are not within the rules as to length of notice – they may be brot by forthwith process; ie – a warrant issued on a written complaint made to a magistrate – 1 Root 436 –

If, however, they are brot in the form of civil actions (as in many cases they are) the usual notice in other cases is necessary, I conclude –

A citation after the writ returned, to the Deft's conservator, is not within any of the above rules – It is sufficient that reasonable notice is given; and if in the opinion of the Ct the notice is too short, the Ct in its discretion will continue the cause, or postpone the trial Ibid – 174 –

One Deft cannot take advantage of defective service upon his co-Deft. 1 Root. 407 –

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Of Bail.

Bail is of two kinds in Com. I. To the Officer 2 Special Bail. 1st When the body of Deft. is arrested under an attachment, it is the duty of the officer to keep him safely - that he may be forthcoming in Court unless he offers to the officer sufficient Bail for appearance 3 Bl 290 - Tidd. 106. - this is bail to the officer.

If then no bail is offered, the officer must regularly commit Deft to prison for safe custody 3 Bl 290 - But a deft. arrested on mesne process cannot be committed in Connecticut without a mittimus, signed by a magistrate; ie a writ directed to the Gaoler, declaring the cause of commitment & requiring him to receive and keep the the deft. till released by due order of Law - St 34 - Civil Office 104 - 199:118 - Mittimus is necessary because the writ does not order commitment - After Commitment, by our practice the Gaoler takes Bail, if offered - (says Judge Reeve) Is the bail bond then taken, assignable as in other cases

But by St 23 H. 6 in Eng. & by our Statute the officer is bound to accept sufficient Bail when offered and to discharge the deft. 3 Bl 290 - Tidd 106 - St 6. 38. - not so at Com. Law -

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To bail, or to admit to bail, a person arrested is to deliver him to his sureties, on their giving security for his appearance 3 Bl 290. If he is supposed to continue in their friendly custody instead of going to goal

The Pltf's right to arrest the body of the deft on mesne process, is founded on his ultimate right to take it in ex. This purpose is answered in contemplation of law by putting him in the custody of sufficient sureties a sort of keepers 3 Bl 290.

The surety given is called a bail bond. The obligors are called bail 3 Bl. 290. 2 Sw. 190.

The bail under our statute must consist of one or more substantial inhabitants of this State of sufficient ability to respond the judgment that may be recovered St 38. 2 Sw. 190.

The bail bond is conditioned for the appearance, of the Deft before the Ct to which the writ is returnable St. 38, 9. 2 Sw. 190. Civil officer. 2, 3.

This bond being given, the deft must be immediately liberated from arrest St 39.

If the officer refuses to accept sufficient bail, when tendered he is liable to Deft, for false

imprisonment 2 Ar. 191. 5 Bac 171. 1 Root. 120 - if tendered before commencement - Capa lies - 1 Bac 206. 2 Wils 313. 1 Com. 489 - 5 do 582 Cro. C 141. or 176 -

If Deft is committed to prision for want of bail, he can be detained on the attachment no longer, than 5 days after the rising of the Ct in which pe - If then ex.n is not served upon him within the 5 days, the Goaler must discharge him (on payment of the Goaler's fees) St 35

When the Deft in ex.n is dead leaving no Ex.r & his relations decline on notice to take out ex.n administration, the Deft may be discharged by the Ct from which the ex.n 1 Bos & Pullen 176 1 Bac 258. So in Connecticut, I presume -

The officer may if he pleases release the Deft without bail, & if he appears or surrenders himself on the ex.n the officer is safe - But this proceeding is at the peril of the officer - for having arrested the Deft he is bound to have him forth-coming - otherwise liable for an escape 3 Bac. 290. Pinky 209 -

But the officer cannot himself become bail for he cannot give a bond to himself. In an action against an Escape, a plea by officer that he gave his own

bond for appearance, if that he is responsible he is no defence Hob 209 - Cide 4 Bac 462: 560 89 - 2 Bl 290 - Doug. 550 or 466 -

Any undertaking otherwise than by bail bond, that a Deft. arrested on mesne process, shall appear he is void by St 23 Hen 6 - 1 Lem 418. 7 do 109: 239 -

In Cont. if the officer take insufficient bail, he is liable to the Pltff. on non est returned upon the ex.t in an action for Escape St 39 - 1 Root 54 - Sems in Eng - The practice there is, to wit the Sheriff first to return the writ, & then to bring in the body, if he does not on the latter will, perfect bail above, an attachment issues agt. him, to compel him to pay debt and costs 3 Bl 291. Tidd 167 - 1 Bac 58. 206 - 4 Bac 462 - 2 - 1 Str 233. 2 Moor 180, 1 - 2 Bl R. 1206 -

It has been decided in Cont. that the officer is not liable, if he takes bail apparently sufficient at the time, tho they should afterwards fail. - 1 Root 54 Sems in Eng. Bl. 191 - Tidd 156 -

The bail may at any time on suspicion of the principals intending to escape, take his body when ever he may be found & surrender him to the action - It has been holden that they may take

him even on Sunday, & surrender him afterwards 1 Bac 2 05: 6 Mod 231. 7 do 77. 85. 98. 2 Ray 716. Tho' an original arrest on that day will be illegal 3 Salk 148. Cap 605. Salk 262. Decided contra 2 Bl R. 1273. & the case likened to a voluntary Escape in this particular 5 Term 26.

But the officer is not bound to accept a surrender before the return of the writ - it is optional with him - Sums of bail above - they may surrender at any time, & the officer must accept - 1 East 383. 390. 6 Term 753 7 do 122. 8 do 456 -

The bail have no authority to command assistance, in taking their Principal; but they have a right to obtain it, if they can - & their assistance cannot lawfully be resisted -

It has been decided in Connt. that an officer having made an arrest, may by an Escape warrant, retake his principal in another State - 1 Root. 107.

The bail bond is negotiable both in Eng. and Connecticut - i e the Pltf. in the action Fidd 1567. 3 Bl 2901. 4 Bac 207 - 1 St 4 Ann - 1 Root 281.

So that the action on the bond may be brot after assignment in the name of the Pltf. 1 Bac 207. 4 do 462 - J. Ct. Nov A dy: term 1789 - Post

it is usually bro. in Con. in the officers name.

If Pltf. accepts an assignment of the bail-bond, he ipso facto discharges the officer Tidd 156 - Salk 99 - 1 Mod 223.

If the bail are sufficient, the Pltf. in Conv. is bound to accept an assignment in discharge of the officer, at least he cannot recover agst the officer after refusing to accept it - So if they were apparently sufficient at the time 1 Root 54 - St 39 - but must seek his remedy on the bail bond -

If then, the Pltf. having refused to accept an assignment of the bond, sues the officer for an escape, it is a good plea for the latter that he took sufficient bail in bail apparently sufficient - so cut supra - & has offered to assign to P then the enquiry turns upon the question of fact whether the bail were sufficient - 1 Root 54 -

Qu. Is it necessary for the officer to plead that he offered to assign, &c - Or is it the Pltfs. duty to demand it, &c - The Statute provides that "no recovery shall be had agst the officer, unless he shall have taken insufficient bail, or shall refuse to let the Pltf. have the bail-bond" which seems to imply that it is the Pltfs duty to demand it - St 39 -

x but pleading a readiness to assign would be sufficient - 2 Ld -

2 If the officer having recovered judgment on the bail-bond dies; a sci fa by his Exr. is not barred by the Deft's paying the original debt - & costs. The Exr. may still recover on the sci-fa, the officer's fees and disbursements 1 Root 253 -

The Deft cannot be twice holden to bail for the same cause of action Tidd 35 - while a suit is pending on one arrest, Deft cannot be arrested again for the same cause - If he is the Court will discharge him Tidd 35, 6 - Stra 1209 - 1216 - - Formerly if Pltf. was nonsuited in the first action - he could not afterwards arrest Deft for same cause Tidd 36 - 2 Ray 679 - Lewis - now - Stra 439 - 1209 - 2 Wils 381 -

But even now in Eng. in debt on Judgment, the Deft. cannot be arrested if he was arrested in the original action Tidd 37 - Stra 782 - 1039 - 2 Wils 93 - 2 Term 75 6. or 75, 6 -

Tho' the condition of the bail-bond is, that if the Deft appears at the time & place &c; yet his non-appearance does non of course work a forfeiture of the bond; for by the Statute the bail are

mad liable only" in case of the principals a-
voidance, and a return of non est inventus
upon the ex.: Ct 39 Thirly 209 - 382. 434 2 Sw.
174 - If the Deft is not surrendered in Ct,
it is Pfts duty, if he would subject the bail
to take out ex.: & to ~~endorse~~ use dee dil-
igence to have his body taken, & if the Deft is
surrendered on the ex.: before non est returned
the bail are ~~discharged~~ saved —

If however the
principal makes avoidance (i.e. is not surrendered
either in Ct or on the ex.:) & a non est inventus
is returned, the bail are liable — Ct 39 - 2 Sw. 174
Thirly 382. 434) Their liability extends to debt and Costs
The return of non est inventus must be made,
formal, both as to the person, & personal Estate
not as to real Estate, I suppose, — For Pft is not
obliged to accept real Estate in discharge, or instead
of the bode —

The proper time to be kept on the bail
bond, appears to be sold, thus from the words of the
statute, I gather, that a Sci-fac will lie Ct 39
& Ct 3. 175 - Thirly 385 — Dw. Root 281. 428, 9
& by the action must be brot in the Ct in which
the original action was brot. 8 Tam. 152 : 6 Cs 265

3 Burr. 1923. 3 Wils 345. 2 Bl R. 838. Sears in Can.

Indeed an actual surrender of the principal upon the ex.r is not necessary to save the bail for it is the duty of the officer holding the ex.r to make diligent search for him, and if by the use of due diligence the officer cannot take him; the bail are liable. Sears, not liable. 2 Sw. 174 Wils 382: 384.

But it has been determined in a case in which the principle shut himself in an inner room & by threats prevented the officer from taking him, that the bail were liable. Sufficient avoidance Wils 382. 2 Sw. 175.

The return of non est inventus must be fairly made, or the bail are not liable. If Off. by artifice procures such a return to be made unnecessary, for the purpose of discharging the bail they are discharged 2 Sw 174 Wils 383, 4.

That delay is not necessary for the officer in order to fix the bail, to delay the return till the expiration of the 60 days, for the purpose of pinning the principal. all that the law requires is that he act fairly, & reasonably Wils 383, 4. 434. 2 Sw. 175.

If the principal dies before non est returned the bail are saved — "Actus Dei" per 1 Ba. 216. 217. 1 Rol. 336. Cutt. 47 —

Bail to the Sheriff then may be discharged — 1st By an actual surrender of the Defts body in Ct. either by the bail or himself 2 Sw. 175; 1 Ba. 218. 1 Rol. 337 — 2 By a surrender of his body, (or I suppose a tender of sufficient personal property on the exr before non est inventus returned; or by his being in a situation by which he might be taken by the use of due diligence 2 Sw. 173, 5 or by his death (vt supra)

3. as will be seen hereafter by Deft's producing or tendering special bail. 2 Root 101 —

4. by Pltf's omitting a plea without special bail, on the words in writ &c —

5. by Deft obtaining final judgment 2 Sw. 175, 6 —

6. By the principal's bankruptcy 1 Bos. & Puller 446 —

A mere appearance in Ct without a surrender, & without pleading, does not discharge the bail 2 Sw. 175 — Thity 434 — does not a dilatory plea &c — Ib. 29 —

If Deft is surrendered in Ct, it is necessary for the safety of the bail, that the surrender be entered on record - for no other than record evidence is admissible to prove the fact - 2 Sw. 175 - Bisby 18 Vob. 218 - Cro. J. 402. 1 Sev. 24 Roy. 50 3 Bulstrode 192 -

The court in order the Pltff may move the Ct, that the Deft be taken into the Sheriff's custody - otherwise he may go at large, & the Pltff loses the benefit of the arrest - Qu. Is it not the duty of the Ct - ex officio to order the Deft into custody ch 39 - It is not the practice -

When the deft whose body has been arrested appears in Ct (and does not enter special bail) he must plead if the Pltff requires it, in custody of the Ct - & if the Pltff accepts a plea not containing these words, the deft's body is discharged 2 Sw 175 - Bisby 434 - and of course the bail -

Qu. Does the rule hold if he is surrendered in Court -

The acceptance of the plea is a waiver of the Pltff's right to hold the body - 2 Root. 111.

But if the Deft having "pleaded in custody" prevails in the original action; he is not obliged on a new trial being granted to plead in Court to a-

gain (Butler vs Emp & Ct) of course he is not obliged on the new trial to give special bail - for this is given merely to prevent his being taken into custody - the Deft has answered the Law by surrendering himself at the return of the writ; and on obtaining judg.t he was of course released according to Law -

If Pltf accepts, in Ct from a Deft whose body has been ~~arrested~~ attached, a plea not containing the words "in custody" & the no special bail being given Deft prevails - Pltf cannot in the S. Ct require the Deft to plead in custody, or give special bail. He has waived the right by accepting the plea - 2 Root. 101 -

Same rule I conclude, if Pltf has prevailed in the C. Ct & the Deft has appealed, for there would be the same evidence of waiver. -

So I conclude the same rule would obtain in a new trial, procured by either party, & whoever prevailed on the first trial - (causa qua supra)

Appearance is the first act of the Deft in Ct Tidd. 122 Sale 8 - In Eng by St 12 Geo. 1. Pltf may enter a Com - appearance for

Deft. - Fedd. 124-6

The Deft appears regularly either by himself, or Attorney - At com-law parties could not in General appear Attorney - Now by St West 2. they may Fedd 114 Co Lit 128 Moor 244 2 Mod 38 Corporations aggregate may appear by attorney Edd 114 Co Lit 66 - Our S Ct have determined that an Attorney may not appear for a town (Deft) unless appointed by a vote of the town, or by an agent authorised by vote to retain an attorney -

~~Infants Deft~~ Sheriffs cannot appear by Atty St 387 - Root 258 - Infants Deft by Guardian or next friend - Deft by Guardians Fedd. 119 Co Lit 135 "Jt. to Husband & Wife - Guardian & Ward &c

If the Principal Deft dies after the return of non est inventus although his death be before the suing forth the ~~[illegible]~~ ane facias, the bail are ~~discharged~~ fixed with the debt & Cost in point of Law. - 2 Wils. 67. 2 Saund 72. - 6 T R. 284

II. Of Special Bail.

Where deft who has been arrested is brot into Ct by an officer or surrendered into Ct by his bail, or by his own voluntary act, he may be admitted to special bail. On which he is discharged out of custody. 3 Kb 290 & the bail to the sheriff are of course discharged. This is called in Eng. bail above or bail to the action 3 Kb 290.1. Fidd. 156.

And if not surrendered he is not allowed to plead without special bail. St 39. if Pltff requires it.

Special bail according to our statute must consist of "sufficient sureties". But it is common to accept one surety. (St 39) If the Pltff does not accept the sureties offered, the Ct decides upon their sufficiency by enquiring of witnesses.

In Con. special bail is given in open Ct only, by the parties entering into a recognizance in a sufficient sum that the deft shall abide the final judgment. St 39. The recognizance is made payable to the Pltff. Stilly 3, 8. It has been decided that the party for whose benefit a

recognizance is taken may file upon it, whether he is comisee or not Rule 378.

In Eng. it may be taken before a Judge or commissioners out of Ct— 3 Bl. 291.—

If the recognizance is forfeited, the special bail are obliged to satisfy the whole judgment rendered against their principal

But it is forfeited no otherwise than by the principal's avoidance, & a return of non est inventus on the ex.: as in cases of bail for appearance At 39.

In Eng. the bail are discharged by surrendering the principal before the ~~ex.:~~ return of the Sci-facias against themselves Tidd 147-9- 1 Bls 270- 2 H Bl 593. 117- 1 H Bl. 74- 2 Term. 176- Bos & Pullen 61-

In Eng. an Attorney of the Ct cannot be special bail- to prevent maintenance Doug. ~~147~~ 450 or 466 1 Bos & Pul. 103- 1 H Bl. 76.— Semble in Conn.—

In Eng. bail to the action i.e special bail have have for the purpose of taking their principal, "a right to go into his house as much as he has himself- i.e- I suppose a right to break his doors 2 H Bl 120- and they may break and enter the house of Stranger,

in which he resides & search for him, the outer door being open 2 Bl. 120. — Qu. Is it necessary that the outer door be open?

Do not the same rule apply to bail for appearance?

Qu. Whether special bail recognized in one State, can take their principal, by virtue of the bail-piece in another? It has been decided that they may by the S. Ct. in the case of Ross vs Waldrup some years since — Also decided in Con. that an officer having made an arrest, may by an Escape warrant retake his prisoner in another State 1 Root. 107.

For the nature and form of a bail-piece see 3 Bl. 191. & Appendix No 3. It is merely an entry or memorandum of the proceeding in letting the Deft to special bail —

If final judgment is rendered agst the Deft. the rule, is, That on the principal's avoidance, and return of non est inventus, the special bail are bound (like bail for appearance) to satisfy the whole judgment, debt, or damages, & costs, St. 39 —

The usual and most proper action agst special-bail is a Sci-facias — it being founded on matter of record St. 39 — 2 Ro. 173 Tidy 378. Tho' I suppose debt may lie but

Practice in Connecticut.-

In the Sci-fac the judg.t rendered agst the principal, is affirmed agst the bail with additional costs St 39-

But the Sci-fac or other process on the recognizance must be served on the bail within 12 month after final judg.t

Suits agst bail to the Sheriff are subject to the same limitation St 39- 2 Sw. 175- 2 Root 380-

It has been decided that the 12 mo.s are calender mo.s - not lunar 2 Root 380- Gen.l rule of Com-Law Contra - 2 Bl. 141. 6 Tem. 224

The particular day on which judgment was rendered agst the principal, may be proved otherwise than by the record 2 Root 380 For no entry on the record is made, in our practice, of the particular day on which judg.t is rendered; all judgments being entered as of the first day of the term

If special bail is given in the C.Ct. on an appeal taken, the Sci-fac. or other process must be served on the bail, within 12 mo: after the judgment rendered in the Supr. Ct - The judg.t in the C.Ct in such case is not final, within the meaning of the limiting clause in the St. for it is destroyed by the appeal -

In consequence of this limitation, ex.c must be taken out by the Principal, if non est inventus returned within 12 mo. Ret. Supra, if it must be taken out in such season, as that the return may be fairly made, ex.gr. not on the day before the year expires —

But according to Swift it may be taken out, at any time which will admit, of due diligence to take the principal 2 Sw. 175. —

But on bonds or recognizances for prosecutions are not within this limitation 1 Root 365 363. 2 Sw. 175 —

A recognizance for the prosecution of an appeal by the Deft. does not exonerate the special bail — In this case both bondsmen are liable (if Judgment goes agst. Deft.) for Costs — if the special bail on the return of non est, for the debt or damages also —

Under an St special bail and bail of bail to the Sheriff, may on Judgments being recovered against them, and before satisfaction, maintain an action against their principal St 39 —

And if a bond of indemnity is given they may doubtless maintain an action upon it, as soon as they ac-

come liable, i.e. on they principals avoidance, and a return of non est inventus if before fait bot. ist. then "vide Con.ts to save harmless")

Note— it is no objection to bail, that they are indemnified by deft, or any third person Bos fe 21. 103.

If final judgment given in favor of Deft, the special bail are of course discharged — as bail to the Sheriff would be, if there were no special bail — 2 Sw. 175, 6 —

And an erroneous judgment tho' reversed by writ of error, has the effect of a final judgment — or rather is deemed a final judg.t within this rule — Ex. a judgment in Ct for Deft. and not appealed from, and reversed in Sbt on writ of error 2 Sw. 175, 6 — 1 Root. 102. 469 — 567 — Sems in Eng — Esp. 195 — —

So, as to bondsman for prosecution on appeal by Deft. — 1 Root 469 —

a judgment in favor of a pt and afterwards set aside by granting a new trial, — as final within the rule 1 Root 469 — 2 Sw. 176 —

Same rule extends to bonds for prosecution, generally, it seems — 1 Root 469 — hence —

every Judgment in chief, then, rendered, for Deft. in S. Ct. & every such Judgment rendered in the C. Ct. or by a single magistrate, & not appealed from, discharges the bail - Swift

Special bail are also discharged, like bail for appearance, by a surrender of Deft.s body (or, I suppose of sufficient personal property) on the ex.n before non est inventus returned, or by his being in a situation in which he might be taken by due diligence - or by his death before such return made 2 Sw. 173. 5 - 1 Bac 216. 217. 1 Rol. 336. Hatt. 47.

Special bail may be changed, on motion, if the bail have failed, or for "other reasonable cause" 1 Root 575. 6 - So, of bondsmen for prosecution of actions or appeals - It seems -

Of Defence and Pleading. —

The Deft having appeared, if where it is necessary having given special bail, or been taken into custody, is to make his defence, which in Conn. forms the next stage of proceedings —

In Eng. the first proceedings, after bail to the action put in, is the filing of the declaration, which may under certain circumstances, be done at any time, within a year after ~~filing~~ suing out the writ 3 Bb. 292. 7 Term 6 —

By defence is meant a denial of the cause of action 3 Bb 296 —

But Judgment may be rendered, in several ways, without defence, as well as after defence made —

I. If Deft does not appear, at the return of the writ, after being three times publicly called in Ct. he is said to make default of appearance and his default is recorded — St 25 —

In 6 Cts the docket is called on the first day of the term, & if deft does not appear then by himself or attorn to answer to his cause, or being called (ut supra) his default

is recorded — & Judgment is entered up agt. him, unless he appears on or before the 2d day & moves for a trial — in which case the default is erased, on his paying the costs to that time Stat 25. —

The Pltff. cannot therefore take out exn. upon a default till the 3d day of the term. —

In the S. Ct. it is not usual to call the docket regularly therefore judgment is not rendered upon default by that Ct. till the cause comes to its turn for trial — unless the Pltff. moves that the cause may be called. —

By a rule of both Cts. however the Pltff. may, at any time take judgment by default — notwithstanding an appearance for Deft. — unless defts Attorn will declare in open Ct. that in his belief, there is a serious defence, and in case he does this the Ct. will order a default to be entered — this is to ~~delay a~~ avoid a delay of justice when there is no defence

After default made, Deft is considered in Ct. for many purposes 2 Ch. Pr. 351. Salk. 216 — Str. 46 — Ruly 17 — E.g. — for the purpose of moving to be heard in damages — on which motion

a hearing is to be had as to the amount of damages only - Thily. 17 - 1 Sw. 96 - 1 Root 566 -

So for the purpose of moving in arrest of Judg.t D. Ray. 1275 -

But after a default deft is not in Ct. for the purpose of moving an appeal, - unless there has been a hearing in damages 1 Sw. 96 - Thily 17 - 1 Root 566 -

An Judg.t by default or upon demurrer damages are assessed by the Ct - A 27 - In Eng. by a Jury of enquiry Doug. 301 - If deft may always have a hearing in damages before the Ct.

But of late a Jury has been dispensed within certain cases in Eng. - as in actions on bills of Exch - 8 Term 326. 395. 410. 1 H Bl 252. 528. 541. 7 Term 473. 4 do 275. 1 Bos & P 369. Doug. 301.

In Eng. a default regularly admits nothing more than that Pff. is entitled to recover something 3 Term 302 Doug. 302 Bull. 278 Tidd 404. 3 Wils 155

In default suffered where the damages are sued, where the presumption, and no hearing in damages is moved by the Deft. Judgment goes agt. him in bar.t for the whole sum demanded; under these circumstances the Deft. by suffering a default admits that he is generally liable to the sum demanded -

But if a hearing in damages is moved, the deft. admits, I conceive, nothing more than that Pltff has cause of action, & he must prove to what amount he has sustained damages 3 Term 302 Doug. 302 So that the default per se, admits nothing more than Pltff's title, to recover something, as in Eng. tho' if no motion is made for a hearing in damages, Judgt. goes for the whole demand, set forth —

When the damages are ascertained as by a written obligation, for money, the default admits a liability, not to the amount of the demand, but for the face of the obligation, except so far as it is diminished by indorsements. i.e. where no motion is made for a hearing in damages — there the Ct. ascertain the damages by inspecting the obligation, & subtracting the indorsements if any. —

Same rule when damages are ascertainable by reference to a known standard, as in actions on obligation for collateral articles — there the Ct. enquire of ye standards as to the value of the articles, tho' no motion set supra — and subtract the indorsements if any. —

But if such motion is made after default

the deft. may, in Conn. prove payments, not indorsed, and denied by Pltff. — Sewd in Eng. — 3 Term. 302, 3 —

In Eng. there being no motion for a hearing in damages, but a jury of enquiry, the rules which regulate the amount of damages are presumptive, on a default, are somewhat different from ours — There if the damages are presumptive a default admits only a cause of action — but on an obligation for money — it admits that the Deft is liable, to the whole amount, deducting the indorsements as in Conn. 3 Term 302. —

2. If the Pltff. at the return of the writ, is guilty of any delays or defaults agst. the rules of Law, or of the Ct. he is adjudged not to pursue his action, and becomes, nonsuit 3 Bl. 395-6 Ex gr. if he omits to procure rules for prosecution when ordered by the Ct. or to give, oyer, when ordered of his deed, Hook &c. —

The Pltff. may also voluntarily suffer a nonsuit, before an after defence made, by hemselling himself to be three times publicly called if not answering But this must be done before the Verdict is delivered to the Clerk, 1 Root 5-7. Thig 273. case of retraxit — but if the jury is returned to a second

on third consideration, he may become non suit before the 2, or 3 verdict delivered to the Clerk, 1 Root 57.

In these cases Deft. on ~~motion~~ motion, has judg.t for costs whether he has made defence, or not — not otherwise without motion — Motion must be made in the term, in which the nonsuit is suffered 1 Ed. Thirty 269 as to retraxit —

In Eng. it is com. for the Judge to order the Pltf to be nonsuit, while the cause is on trial; if his declaration does not state, or his case does not prove a cause of action. —

But the Pltf. is not obliged to submit to the order — on being called he may appear, & then the cause must be tried by the Jury 1 Term. 175, 6 — Case in New York of Pltf's recovering after nonsuit ordered & without any evidence —

After a nonsuit suffered under an order of Ct. Pltf. is deemed to be in Ct. for the purpose of moving to set it aside — as being agt. law 2 Ch Rd 356. —

Non suits are never ordered in Connecticut

After nonsuit Pltf. may sue

again, for same cause 3 Bl. 296.—

3. retraxit — Judgment may be rendered at the Pltf. upon a retraxit either before or after defence made 3 Bl 296—

A retraxit or withdrawing of the suit, is an open & voluntary renunciation of it in Ct. 3 Bl 296 —

After a retraxit Pltf. cannot in Eng. commence a new suit for the same cause (3 Bl 296 — Seems in Conn.

The Pltf. may withdraw in any stage of the suit in which he may suffer a non suit (last page) — not after verdict delivered for (not as to) Root 552. 571 — nor after a return of arbitrators, or auditors Kirby 273 — nor after the Ct. has expressed the substance of a decree in Chancery, tho' no bill in form has passed — it seems

After retraxit the dft. must move to have Judg.t for costs; or he waives the right — of the motion must be made in the same term, in which the retraxit is entered Kirby 289 — So, of nonsuits

If both parties fail to appear at the term of the suit, on being three times publicly called, the entry, wd, in our practice, is "no appearance" & this the cause is out of Ct. — no judg.t is

rendered - if the suit cannot be revived, without consent of both parties Kirby 361 - If it is, a bill of exceptions may be filed & judgment reversed.-

If both parties having once appeared, fail afterwards to appear on being 3 times publicly called, a discontinuance is entered, if the cause is out of Ct. 1 Root. 439.-

Defence is made by the Deft's plea 3 Bl. 296 - his to Deft's modes of defence i.e. Deft's kinds of pleas. See "Pleas & pleadings."-

of the time of making defence, or pleading.-

By U in Conn. all pleas in abatement in C. Ct are to be "made, heard, & determined" before the jury are impannelled At 342 - & the issue in every case joined before that time.

This provision has been found impracticable, & the rule of the Ct now is, that they shall be made & tendered only, before the rising of the Ct in the afternoon of the 2nd day - "Pleas & pleadings"

In S. Ct all original pleas in abatement, must be made & tendered, or delivered to the Clerk by the opening of the Ct in the afternoon of the 2nd day Root. 564

Pleas in abatement which go to the ~~fa~~ merits, as on petitions in Chancery, not within these rules— nor pleas in abatement of writs of Error Thirly 289.

Pleas in ~~abatement~~ abatement to the action, in S. Ct to be made, according to the old rule, by the opening of the Ct in the morning of the 3 day, where the term is but one week, & of the 4th day where the term is longer — 1 Root 567.—

This rule has never been strictly regarded in practice — & since the new organization of the ~~Ct~~ S Ct a rule is made in every term, as to those causes, which are continued, for pleading in vacation —

Changing & altering pleas

Under our St. whenever the Deft supposes that he has mistaken his plea, he shall have liberty to ~~amend~~ alter it — in which case the Ct in its discretion may oblige him to pay costs — & the Plff is to have a reasonable time allowed for making answer to it — St 342 & the Ct exercises a discretion, to a certain extent, in allowing the alteration. 1 Root 425.

But after Deft has pleaded to issue & Judgt has been rendered upon it in any Ct, he cannot demur to the declaration — Exp Genl issue in the Ct, and an appeal to the S Ct — Deft cannot

demur in J. Ct — So on appeals from justices to C Cts St 342 Phily 89 —

But it is a general rule that the Deft, on an appeal, may in the Ct appealed to, change his plea, made in the Ct below of course and without costs — General usage — Deft "changing, pleads" &c is the form in this case —

He cannot, however, go back in the order of pleading, as from a plea to the action, to a dilatory plea: for the latter are waived by the pleading to the action, "Pleas of pleadings"

— so can he change a plea of Ctt, in his pass an appeal"

The rule however has been in the J. Ct, as to changing, in the Ct appealed to, the plea made below, that it must be done, by the opening of the Ct in the morning of the 3 day, the term being one week, & of the 4th day if longer 1 Root. 564 —

This rule is never strictly observed, & now dispensed with — of course in the J Ct. as to causes continued by the rule to plead in vacation

The general rule supra as to changing in the Ct appealed to, the plea made below depends on usage — If the Deft chooses to rely, in the Court appealed

to, on the plea made below, there is no need of pleading it de novo in the Ct above -

As to the alteration of the plea, under the St. in the Ct in which it was originally made, it has been decided that the deft may alter even after the trial has begun. 1 Root 75. 434. 404. 2 Dw 227. 2 Root 406 - It saves a new trial for misplead-ing - & the St. says "Whensoever" &c

A replication made in C.Ct to a plea in abatement may be altered in S.Ct 1 Root 301.

But the Ct. will not allow the Deft to alter, in any case by making a new plea, which is inapplicable to the action 1 Root 425 -

The Deft. has been allowed to alter, by pleading to issue, after a demurrer expired, & the record delivered to the Ct for judt. 1 Root 476, 2 Dw. 227 -

Decided by the S.Ct that pleas in abatement may be allowed 2 Dw. 205.

Practice in Connecticut.—

Issue and Trial.—

The issue being closed the cause comes to trial— Regulating matters of law are to be determined by the Ct, & matters of fact by the Jury Ct 267

Questions of Law are however often involved in issue in fact, especially in the general issue in an action Ct 342

On the other hand, issues in fact may ~~be~~ by consent of both parties be tried by the Ct. not without such agreement Ct 27.

Issues in Law are always determined by the Ct Ct 267.

After a trial begun by the Jury, the Ct will not stop the hearing & continue the cause without the consent of both parties 2 Root 25, 45.—

Our Cts do not—on giving the charge to the Jury, direct them how to find, nor give any opinion upon the fact or Law— But if dissatisfied with the verdict, they may in civil cases return the Jury to a 2nd & 3d consideration— not to a 4th Ct 27. Kirby 1, 9. 416.—

This may also be done in Eng. but it is not of use; as the judge directs the Jury in the first instance Tra 1183

After the cause is committed to the jury no further argument or evidence can be heard St. 28.

The party who takes the affirmative of an issue in fact, first exhibits his evidence, & his counsel opens & closes the argument. 1 Root 571.

After the Deft. has entered upon his defence, the Pltff. having closed his evidence, it is discretionary in the Judge in Eng. to let the Pltff. into evidence on a collateral point not before in controversy, to turn the evidence agst the merits of the principal question, or not. 1 East 604.

On issues in Law, the Counsel for the party taking the exception, opens & closes the argument.

On motion, & interlocutory questions, only one Counsel can be heard on each side, without leave of the Ct.

By St. only one Counsel is allowed to argue a cause even on the merits, unless the demand is above $34 or the title of Land concerned St. 36. Rule not regarded much in practice.

If a person is substantially made Deft. to prevent his testifying, there are two modes, in which that purpose may be defeated, at the trial. 1. If no evidence appears agst him, the Ct will on motion, expunge his name & permit him to testify. 2. If some slight agst him, he may on motion, be tried first, & on an argument

of testy Esp 420. Bull 285. 1 Root 489: 2 do. 282. 420.

As to Jyn Bills of exceptions Demurrers to evidence &c See the "title Bills of pleadings"

For challenges to jurors, see Quests of Judgment.—

Verdict.—

The verdict is the finding of the Jury on the issue left to them. 3 Bb 377.—

Regularly every issue should found affirmatively, or negatively, in the terms of it. It is not sufficient for the Jury to say, "they find for the Plt." It is not that they find all the material facts stated 1 Root 572. Yet if they find in terms, the substance of the issue, the verdict is good — See arrest of Judg.t —

The Ct. may alter the verdict to make it formal when the substance of the issue is found — 1 Ff Bb 78.

The constable who waits upon the Jury may not be present while the Jury are deliberating upon the cause 1 Root 573 Ex. with Judgment be arrested for this cause. —

For different kinds of judgments & their effects — See pleas & Pleadings. Writs of Error —

If the Jury give more damages than are demanded, Plt. may remit the excess & take Jud.g.t for the rest Esp 314. 420. 4 Bac 25, 6 — 1 Root 66.

Interest when recoverable see Usury —

As to severing damages where there are several Defts. See "actions of Trespass," & of assault & Battery Cap. 5-3 & 420.
Courts may join and or supersede writs or writs, issued improperly Cap. 2 & 3

Of Costs.

At Com. Law no costs were allowed to either party, but the Pltf. when unsuccessful was amerced pro falso clamore & Deft. when judg.t passed agst. him, for the unjust detention of Pltfs right. 1 Bac 511. 2 Inst. 288.

Now in Eng. Costs are allowed to the prevailing party in most cases by several Statutes, the 1st of which is the St. of Glouster 6 Edw. 1 c 1 Bac 511.—

Costs are regularly allowed, in Conn. to the prevailing party, in all civil actions, I believe, except in four cases 2 Sw 268.
1st They are never taxed for Pltf. in Error, on the fact in error. See writs of Error St. 161.
2nd When Judg.t is arrested for the insufficiency of the Declaration. 1 Root 70. 172. 2 [illegible] 268
3 If the Deft. in book debt fails to exhibit his book-account in order to be offset agst the Pltfs, & afterwards brings an action agst the Pltf. to recover the book debt which he might have exhibited in the for-

mer action, if prevails, he can have no costs unless he shows to the Court, that he had no knowledge of the former suit, or was inevitably hindered from appearing & exhibiting his account St. 136. —

If an appeal from Probate & judgment is disclaimed, for mistake of the Judge — no costs are allowed — like writs of Error 1 Root 157. Secus, if the mistake is occasioned by fraud or negligence in appellee —

Our St. provides that no action of trespass, assault & Battery, & trespass on the case brot. before the Supr. or C. C. P. if the damages found do not ~~exceed~~ amount to 7 dolls., Pltf. shall recover no more costs than damages — unless the Title or inheritance or interest of Lands or freehold Estate is the principal matter in question St. 29. 9. Sw. 268. 9. 2 Root. 88. 160. — or unless the Deft. shall have appealed to the C. or Supr. Ct., in which case the Pltf. if he recovers judgt. shall have full cost St. 29.

To prevent trivial & vexatious suits Pleas of title not necessary in the allowance of full costs 2 Root 88. 160.

But this St. I believe, has not been construed to extend to actions on the case founded on contract 9 Sw. 268. 9.

Trover for ex.r for £41, delivered to Pt. after suit bro.t — Damages 12/ & full costs allowed. 1 Root: 136 — 2 Sw. 269 —

Whenever deft. appeals from a judg.t on a plea in abatement, & does not support the plea in the ct. appealed to, cost shall be taxed ag.st him, up to the judg.t on a plea in abatement, & ex.r shall issue for that, however the cause may finally issue. St. 22. 2 Sw. 269 To discourage frivolous exceptions. —

After a writ has been abated & amended, if Pff. obtains final judgment, he recovers no costs which accrued before the amendment, except for writ, dft & officers fees Stiles & J. 2 Sw. 268

On appeal from Probate to S.C. by a minor, the decree being affirmed, costs were taxed ag.st the minor 1 Root 325 Qu. Should not the costs have been taxed ag.st the Guardian — "Parent & Child".

On motion in arrest of judg.t, if a repleader is awarded, full costs are taxed on the final judg.t 1 Root 373 —

In actions ag.st several one dft. obtains a verdict, & the Pff. prevails ag.st the others, the former is entitled to costs —

that he can have only one Mot. taxed, & only his proportion of the ct. and fees 1 Root 486.—

If two Deft.s are joined in a suit, in which they cannot be joined, & prevail; costs are taxed for each, (vt supra) 1 Root 550.— Seems if the joinder were proper— there could be but one bill of costs taxed for both, & travil & attendance for one only.—

And if two or more Deft.s appear in suit, only one bill of cost is taxed— & travil & attendance for one only.—

In Petition for N. Trial, if the respondent is cited to appear at the term, to which the petition is returned & the petition itself is addressed to the Ct & at another term, the respondent is entitled to costs.— He is in Ct. under the citation, tho' the petition is not regularly before it 2 Root. 31.

In quitam prosecutions, if the deft. is ~~required~~ acquitted, he is entitled to Cost— as in civil actions 2 Root. 136.—

On Judg.t by confession, the magistrate can tax costs only for his own fee, unless there was an antecedent process; & if there was; the fact must appear on the record, to justify the taxation of any additional Costs Thrift 236. 152. 1 Sw. 168.

Costs are regularly taxed in Court by the Junior Judge, tho it is said they may be taxed out of Ct. Thrift 251.

Practice in Connecticut.—

On Judgt. upon plea in abatement costs are taxed in C. Ct. only up to the second day of the term — Because the St. provides, that such pleas shall be heard & determined in that time —

The Atty of the prevailing party has a lien upon the costs; & may require the officer holding the exn. or the adverse party, not to pay them to his client Esp 584 Dang. 226. 2 Bb. R. 826. 2 Hb. 440. 587. —

But this lien is subject to any equitable claim of the adverse party; as to a set off. 1 Hb 24. 128. 217. 657. —

The party amending is to pay costs, at the discretion of the Ct. St. 223. 342

For the mode of setting aside Judgments, — see Writs of Error, & Trials? —

Courts may remand or supersede executions improperly issued Cowp. 183 4 Bac 668 —

Of Amendments. —

Anciently at Com. Law amendment tho' allowed before the record was made up, were regularly not permitted afterwards, except in the term in which the record was made up recorded took place 3 Hb 407. 411. 1 Bac. 89. — 8 Co. 156, 7. 4 Bac. 25 67. —

And according to the practice which commenced

about the 13 Cent. & continued a long time, not even the ~~slightest~~ & plainest mistake could regularly be rectified after the record was enrolled & the term passed 3 Bl. 410. 4 Burr 2567 -

All present amendment are more liberally allowed in Eng. at Com. Law - And when justice requires it, they are permitted at any time while the suit is pending - i.e before final judgment - & not afterwards 3 Bl. 407 -

But now in Eng. all formal mistakes are in general aided by the Statute of Jeofails which are numerous, the earliest of which is the St. 14th of Edw. 3 - 3 Bl. 407-8. - 1 Bac. 90-5 - 96 &c 2 Burr 1098. -

~~But more in Eng. all formal mistakes are in general~~ These Eng. Statutes extend in general to artificial & formal mistakes, not substantial defects or mistakes 1 Bac. 96. 97. 101. 2 Roll. 115. 6 Mod. 64. 8 Co. 15. 159 &c - Examples of formal: false latin - false speling - misnomer &c - of substantial - suing Exors. &c in the debet - want of a proper signature &c -

We have two Statutes on this subject - The first provides that no suit, pleading, judgt. or proceeding shall be abated, suspended, or reversed, for any kind of unsubstantial errors, mistakes, or defects, if the person &

the case may be rightly understood by the Court St. 22

This provision, however is too general, & vague to admit of any effectual application in practice — Pleas in abatement & special Demurrers for formal defects are probably, as frequent & as successful, as if no such Statute existed.

An old St. also provides, that when on plea in abatement, Judgt is rendered in favor of the Dfdt. the Dfdt. shall have liberty to amend his writ, on payment of Costs to the time of the amendment — St. 22 This St. extends to formal defects only —

It has been decided that a motion to amend under this St. was unnecessary Rule of 5, 6. —

By an new St. enacted in 1794. the several Cts of Law & equity may at any time permit the parties to amend any defect mistake or informality, in the writ, declaration, or pleadings, or other parts of the record in civil causes, upon payment of Costs, at the discretion of the Ct. St. 23. 2 Sw. 227, 8. this St differs from the old in several particulars

1. Under this St. motion, to amend is necessary — "Cts. may permit" — Was under the old — (Supra)

2. Under the old Statute the writ only was amendable — Under the new any part of the record may be

3. Under the old, no amendment could be made, till

of the statement as must be left on the plea in abatement.

Under the new amendments may be made at any time or term even before plea made — if by either party at any time afterwards. 1 Rost 565. 2 Rost 57. 119.

4. For amendments under the old, Pltf. was obliged absolutely to pay the legal costs.

Under the new, the allowance, as well as the amount of costs, is holden to be discretionary with the Ct. 1 Rost 565.

The S. Ct. however allow the taxable costs agst the party amending, almost universally. The Com. Pleas in Fairfield County, very seldom allow any.

5. Under the old St. formal defects only were amendable.

Now the new any defects of form may be amended, viz, 1 When the process is coram non judice, or otherwise void. 2 Sw. 205. Exp. no estimate of dmg. paid.

2. When the amendment proposed would change the nature of the action 1 Rost 565. 2 Ro. 178. 2 Sy. 492.

3 When, tho' the writ is not void, the amendment proposed would not [illegible] it. Ex. insufficient serv. 2 Sw. 205.

The Ct. has been allowed to raise the [illegible] demurrer. Ellis v Clark N.H. County Jan. 1820. — & in Fairfield Co. Apr. 1823. the Inferior Court permitted a defendant to be amended, & the judgment upon Demurrer that it

was insufficient - Cid. 1 Root 49. 50. 2 Zem 132. 1 Bos & P. 3.
2 D. & W. 30 Mitf. 15. Dang. 204. 316. 438. Replication a-
mended after verdict bcwf 407. Sha. 641. 8 mod 376.-

So pen. Indentures changed to special, tho. on
clerk. - Special 2 Zem 132. -

One of two Plt. permitted
to amend, by erasing the name of his co-Plff. 1 Root. 86.

Writ of error misdescribing the court below, is amen-
dable before hea. 1 Root 115. 173 551.

Writs of Error are
regularly not amendable in Eng. 1 Com 344. Salk 49.
Carth 520. 9 Mod 202. 207.

After an amendment of the writ
the Deft. may plead in abatement de novo - & so as often
as amendment are made; bc from the time of amendment
it is considered as a new writ Hob 55, 6 - Hosp -

But when a Plaintiff has leave to amend, he must amend
at once, all amendable defects.

The record of a justice not amendable on writ of
error, unless he has some written minutes by wh.
to make the amendment 1 Root. 173 -

~~6 Ots.~~ ~~the mistake of the Clerk~~ So in 5 Ot. &
6 Ots. the mistake of the Clerk cannot be amended
~~after the term~~ is past, unless there are written minutes
of it 1 Root. 572. - Sund during the term. -

[illegible] 1 Mass. 412.

1 Ro. Ab. 974.

Ct. allowed to amend his plea, as he lies at bar in the jury 2 Mass 506.

The Statutes of amendment do not extend to criminal prosecutions — nor to civil suits with executions see 2 Bin. 1099.

1 Bin 95. 6. Salk 51. Cro 6. 144. Cro J. 414. 7 Term. 55.—

At Com. Law there is no difference as to amendments between civil & criminal cases 4 Bum. 2567. 2 do. 1099.

If the statement of an extensive fact will make the writ good, it may be amended. Dunden in Cont. Thus when the defect in the writ is extensive, it may be amended, if a statement of the truth will make it good Ex. misnomer, misdescription &c. —

But if such statement will not aid the writ it is impossible to amend — Ex. insufficient service in fact, tho the indorsement imports good service — there no amendment will be allowed 2 Sw. 205.

So of the pendency of a former writ for the same cause of action —

So if the return of service is not sufficient upon the face of it, yet if sufficient in fact, the writ may be amended by stating the truth 2 Sw. 205. —

But when the writ is void, it is impossible in the

nature of the thing, to make it good by any allegation. Ex — no signature of a magistrate — no certificate of duty held — No direction to an officer &c. —

In some instances, a verdict may be amended by the Ct. — Ex. If on a declaration containing good & bad counts, no evidence is given on the ~~good~~ bad, & the jury find a general verdict for Pltff. it may be amended by the Judge's minutes, if entered on those counts only to which the evidence applies Doug 361. 1 Bos & P. 329. Semble if any evidence was given on the bad counts — do: 362. 2 Barnes 478. — Here a venire de novo must issue —

~~And a special verdict may be amended~~ So, a mistake by the Clerk in entering a verdict may be amended — Ex. — in the damages found &c Sta 1197. 1 Bac 101 Bro Eliz 112. 677. 2 Ray. 335. Sta 514. Salk 53 —

And a special verdict may be amended — as where a circumstance deemed by the Court material, & clearly proved is committed Sta 513. 1 Lev. 135. 1 Bac 101. Salk 47. 48. 4 Co 52. Co. C. 144. —

But in a criminal case a verdict whether general or special is said not to be amendable Salk 53. 1 Bac 101. 2 Ray. 141. Cro. Vide 11 Mod. 84 Doug. 362. —

LECTURES
ON
LAW

III